TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 572.

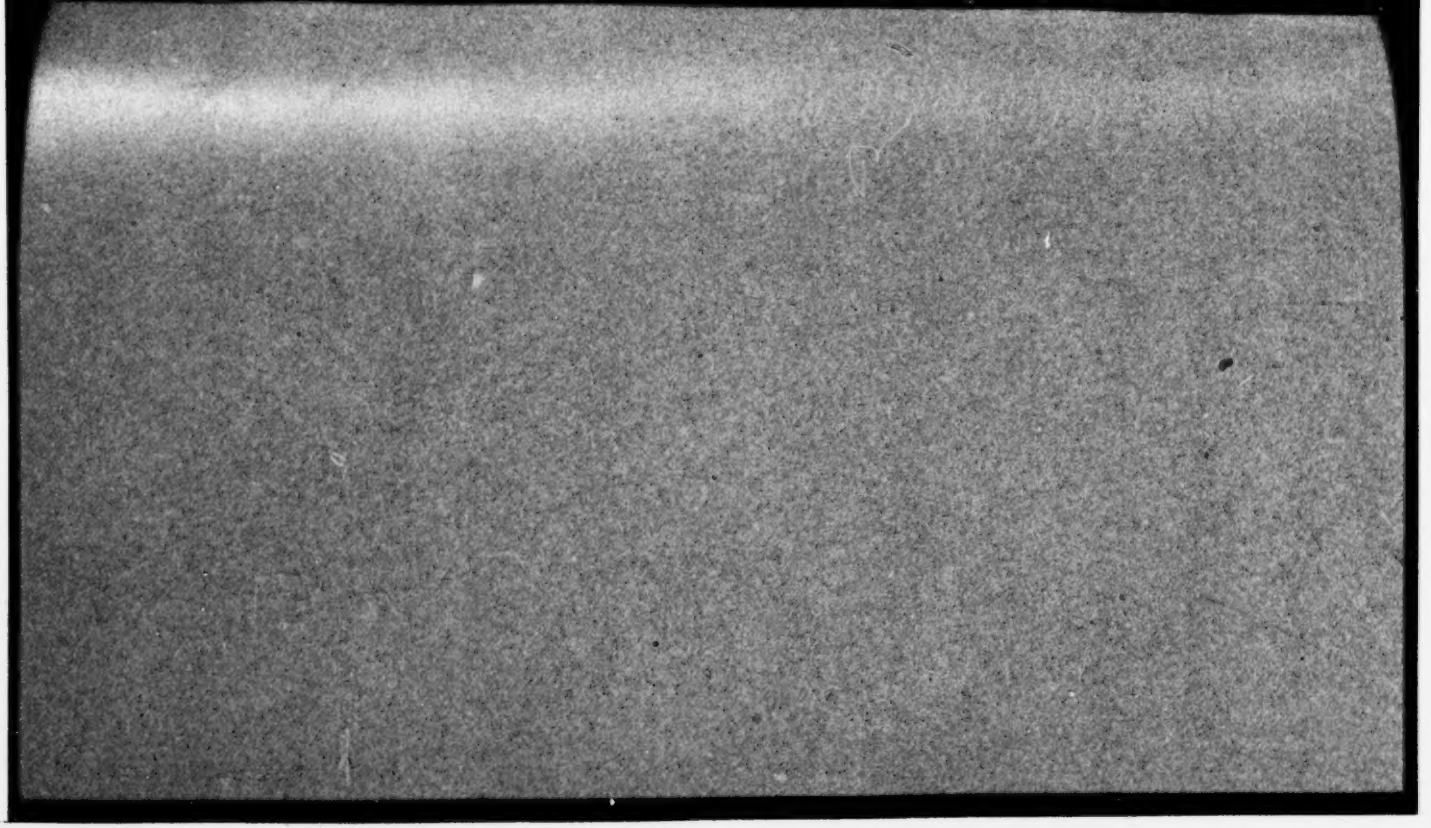
SOLOMON HOTEMA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED FEBRUARY 26, 1902.
(19495.)



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INDEX.

	Original.	Print.
Caption	a	1
Transcript from the United States court for the Indian Territory	1	1
Caption	1	1
Order as to grand jury, etc	1	1
Order as to grand jury, etc	2	2
Order filing indictment	2	2
Indictment	3	3
Arraignment and plea	4	3
Order for change of venue	5	4
Application for change of venue	5	4
Order to remove defendant to Paris, Tex	6	5
Clerk's certificate	6	5
Arraignment and plea	7	5
Order beginning trial	9	6
Order continuing trial	10	7
Order concluding trial	11	7
Order declaring mistrial and discharging jury	12	8
Demurrer to special plea	14	9
Order beginning trial	15	9
Order continuing trial, etc	16	10
Order continuing trial	18	11
Order concluding trial	19	11
Order postponing case	20	12
Verdict	21	12

21169—02——0

	Original.	Print.
Order overruling motion for new trial	23	13
Judgment and sentence	23	13
Petition for time to sue out writ of error	25	14
Order granting time to sue out writ of error	25	14
Bill of exceptions	26	15
Special plea	26	15
Exceptions to order sustaining demurrer	28	16
Exception to refusal to allow defendant to open and close argument	28	16
Exceptions to charge	28	16
Exception to refusal to charge	34	19
Verdict	35	20
Motion for new trial	36	20
Exception to order overruling motion for new trial	42	23
Judge's certificate as to bill of exceptions	42	23
Charge to the jury	46	25
Petition for writ of error	58	30
Assignment of errors	59	31
Citation (copy)	67	35
Clerk's certificate	68	36
Writ of error	69	36

a THE UNITED STATES
vs.
SOLOMON HOTEMA. } No. 2027.

Be it remembered, that at a regular term of the honorable district court of the United States for the eastern district of Texas, at Paris, which began on the eighteenth day of November, A. D. 1901, and adjourned sine die on the twenty-ninth day of November, A. D. 1901, the above styled and numbered cause was heard and disposed of.

1 In the United States Court of the Indian Territory for the Central District of Antlers.

Be it remembered, that at a regular term of the United States court of the Indian Territory for the central district at Antlers, begun and held at the United States courthouse at Antlers in said district, on Monday, the 2nd day of April, 1900, that being the day fixed by law for holding of said court, present and presiding, Honorable Wm. H. H. Clayton, judge of said court; also present E. J. Fannin, clerk of said court, by his deputy, Thomas B. Latham; J. H. Willkins, U. S. attorney for said district, and J. P. Grady, U. S. marshal for said district;

Whereupon at 8½ o'clock a. m. of said day court was declared duly open for the transaction of such business as might lawfully come before it, when the following proceedings were had, to-wit:

GRAND JURY.

It appearing that no jury commissioners were appointed to select grand jurors to serve at the present term of this court, it is ordered that the marshal of this district summon sixteen good and lawful men from the Antlers division of this district to serve as grand jurors.

And now comes the marshal and returns into court the names of the following persons, to-wit, James H. Miller, William Colbert, James Costilow, Samuel K. Newcomb, Samuel K. Nelson, John C. Parker, Thomas L. Griggs, Gabril Paxton, Carlow Wilson, Samuel L. Oakes, Frank Moyer, Jefferson Gardner, Cornelius Bennett, James W. Kirk, Huston Labor, William Stanley, sixteen good and lawful men of this district, who were duly sworn and qualified as grand jurors, and were thereupon duly sworn, impaneled, and charged as grand jurors for the present term of this court, and entered upon the discharge of their duties, J. H. Miller being by the court appointed foreman of said jury, and it further appearing that William Blackburn was duly summoned as a grand juror, and is sick and unable to serve, it is ordered that he be excused during the present term of this court.

Ordered that court stand adjourned until to-morrow morning 8½ o'clock. Wm. H. H. Clayton, judge.

2ND DAY OF APRIL TERM, 1900.

TUESDAY, *April 3, 1900.*

2 Court met pursuant to adjournment, present and presiding as of yesterday. Whereupon the following proceedings were had, to wit:

IN RE GRAND JURY.

And now for good cause shown, it is ordered that T. L. Griggs be excused from further service as a grand juror, and that the marshal summons from the body of the district one person qualified to serve as a grand juror. Whereupon comes George Hall, summoned by the marshal as aforesaid, and J. C. Parker, William Colbert, James Castillow, J. W. Kirk, Lorenzo Oakes, Huston Labor, Frank Moyer, Jefferson Gardner, Gabril Paxton, Nelie Burnett, Carlow Wilson, S. K. Newcomb, S. K. Nelson, J. H. Miller, and William Stanley, heretofore selected as grand jurors, each and all of whom possess all the qualifications required by law, who are by the court duly selected, empaneled, sworn, and charged as a grand jury to serve during the remainder of this term of court, and J. H. Miller is by the court appointed foreman of the grand jury. Whereupon the grand jury retired from the bar of the court to consider of their business.

Ordered that court adjourn until to-morrow morning 8½ o'clock. Wm. H. H. Clayton, judge.

3RD DAY OF COURT, WEDNESDAY, APRIL 4, 1900.

Court met pursuant to adjournment. Present and presiding as of the other days. Whereupon the following proceedings were had, to wit:

IN RE GRAND JURY.

And now comes the grand jury into open court, all being present, and through their foreman, in the presence of each and all of said grand jurors, return into open court indictments in the following cases, each indorsed a true bill and signed by their foreman, to wit:

UNITED STATES *vs.* SOLOMON HOTEMA.	)	347. Murder.

Each of which indictments are by order of the court filed in open court. Whereupon court arose until to-morrow morning 8½ o'clock. Wm. H. H. Clayton, judge.

3 INDICTMENT FOR MURDER IN THE INDIAN TERRITORY COURT NO. 347.

UNITED STATES OF AMERICA,
Indian Territory, Central District, ss.:

In the United States court of the Indian Territory for the central district of said Territory at the April term, A. D. 1900.

UNITED STATES *vs.* SOLOMAN HOTEMA. } Indictment for murder.

The grand jurors of the United States of America, duly selected, summonsed, impaneled, and sworn and charged to inquire into, within, and for the body of the central district of the Indian Territory aforesaid, at Antlers in the name and by the authority of the United States, upon their oaths do find, present, and charge that one Solomon Hotema, on the 14 day of April, A. D. 1899, within the central district of the Indian Territory aforesaid, with force and arms, in and upon the body of one Vina Coleman then and there being, feloniously, willfully, and of his malice aforethought did make an assault; and that the said Solomon Hotema with a certain gun then and there charged with gunpowder and leaden bullet, which said gun he the said Solomon Hotema in his hands then and there had and held, then and there feloniously, willfully, and of his malice aforethought, did discharge and shoot off, at, and upon the body of the said Vina Coleman, and that the said Solomon Hotema with the leaden bullets aforesaid, out of the gun aforesaid then and there by force of the gunpowder aforesaid by the said Solomon Hotema shot off and discharged as aforesaid, then and there feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound her the said Vina Coleman in and upon the body of her the said Vina Coleman, giving to her the said Vina Coleman then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the gun aforesaid, by the said Solomon Hotemma, in and upon the body of her the said Vina Coleman, one mortal wound, of which said mortal wound she the said Vina Coleman then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid do say that on the day and year aforesaid, and at the place aforesaid, the said Solomon Hotemma, her

4 the said Vina Coleman in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

J. H. WILLKINS,
United States Attorney, Central District of Indian Territory.

Witnesses: Sina Morris, Grant, I. T.; Israel Morris, I. T., Grant, I. T.; Bond Coleman, Grant, I. T.; Benj. James, Grant, I. T.

(Endorsed:) Criminal Docket No. 347. In the United States court of the Indian Territory, central district. United States *vs.* Solomon Hotemma. Indictment for murder. A true bill. J. H. Miller, foreman of the grand jury. Filed in open court Apr. 4, 1900. E. J. Fannin, U. S. clerk. By Thos. B. Latham, deputy clerk.

7th day, April term, 1900, Monday, April 9th, 1900

UNITED STATES
vs.
SOLOMON HOTEMMA AND SAM FRY. } Indictment for murder. No. 347.

On this day comes the United States of America, by J. H. Wilkins, esq., attorney for the central district of the Indian Territory, and come the said defendants each in custody of the marshal and by their attorneys, Linebaugh Bros. And it appearing from the returns of the marshal herein that each of the defendants have been duly served with a copy of the indictment in this cause, and a list of the petit jury empaneled and in attendance at the present term of this court, more than 48 hours before the arraignment herein. And said defendants having had hearing of said indictment, and it being demanded of them concerning said indictment, above specified and charged upon them how they would acquit themselves thereof, they say each for himself that they are not guilty as charged in said indictment, and put themselves upon the country. And now comes said defendants and each files his affidavit
5 with the clerk of this court that he can not get a fair trial in said cause at this court. And it appearing to the court that the defendants are each members of the Choctaw tribe of Indians, and the court being well and sufficiently advised in the premises doth order a change of venue in this case to the United States district court for the eastern district of Texas, at Paris, Texas, that being, in the judgment of this court, the nearest and most convenient to the place where the crime charged in the indictment is supposed to have been committed. And it is further ordered that the clerk of this court forward immediately to the clerk of the United States district court for the eastern district of Texas, at Paris, Texas, a true and duly certified copy of the records of this court made in this cause, together with all original papers filed herein in this court. Ordered that court adjourn until/ to-morrow morning 8½ o'clock. Wm. H. H. Clayton, judge.

In the United States court for the central district of the Indian Territory, at Antlers.

UNITED STATES
vs.
SOLOMON HOTEMA. } No. 347.

Application for change of venue.

The defendant, Solomon Hotemma, states that he is charged by indictment pending in this court, and which was returned into this court on the fourth day of this month, with murder alleged to have been committed within the central district of the Indian Territory, and that he is a member of the Choctaw tribe of Indians, and that he can not obtain a fair and impartial trial in this court, and that the United States court at Paris is the nearest and most convenient place of holding court to the place where the offense is alleged to have been committed.

S. E. HOTEMMA.

Subscribed and sworn to before me this the 9th day of April, 1900.

[SEAL.] D. M. BROWN,
Notary Public.

(Endorsed:) Filed in open court Apr. 9, 1900. E. J. Fannin, U. S. clerk. By Thos. B. Lathim, deputy clerk.

13th day of April term, 1900, Monday, April 16, 1900.

Court met pursuant to adjournment. Present and presiding as of yesterday. Whereupon the following proceedings were had, to wit:

6 UNITED STATES } Indictment for murder. No. 347.
vs.
SOLOMON HOTEMMA. }

Now on this day it is ordered by the court that the marshal for the central district of the Indian Territory, without unnecessary delay, remove the body of defendant, Solomon Hotemma, herein charged with murder, to the United States jail at Paris, Texas, and deliver him to the keeper of said jail, in conformity to a change of venue granted in this court to the eastern district of Texas on application of defendant. Ordered that court adjourn until to-morrow morning, 8½ o'clock.

WM. H. H. CLAYTON, *Judge.*

UNITED STATES OF AMERICA,
Indian Territory, Central District:

I, E. J. Fannin, clerk of the United States court in the Indian Territory for the central district, do hereby certify that the above and foregoing 14 pages contain a true, correct, and complete copy of each and all record entries and the indictment and affidavit for change of venue in the case of United States vs. Solomon Hotemma, No. 347, as the same now appears of record and on file in my office at Antlers.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Antlers, this 25th day of April, A. D. 1900.

E. J. FANNIN, *Clerk.*
[SEAL.] By THOS. B. LATHAM, *Deputy.*

(Endorsed:) D. Cr. 2027. United States vs. Solomon Hotemma. Murder. Transcript. Filed May 8th, 1900. C. Dart, clerk. By H. H. Kirkpatrick, deputy. Filed Nov. 17th, 1900. J. B. Dailey, clerk.

7 Be it remembered that upon the 1st Monday in April, A. D. 1901, the same being the 1st day of April, 1901, there was begun and holden in the United States court-house in the city of Paris, Texas, a regular term of the honorable the district court of the United States for the eastern district of Texas, at Paris.

Present and presiding, the honorable David E. Bryant, United States district judge; also present, Marcus C. McLemore, U. S. dist. atty., H. B. Birmingham and Frank Lee, his assistants, John Grant, U. S. marshal, and John B. Dailey, clerk of said court, when the following proceedings were had, to wit:

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid at the court rooms of said court in the city of Paris, on Wednesday, the 17 day of April, A. D. 1901, present, the honorable

D. E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } No. 2027. District court, criminal docket.
vs.
SOLOMON HOTEMA. }

This cause coming on this day to be heard, came the United States by her attorney and announced ready for trial, and the defendant, Solomon Hotema, in his own proper person and by attorneys, appeared and announced ready, and the said defendant being arraigned plead
8 not guilty, and thereupon came on the empanelling of the jury, and the following-named persons, to wit, T. J. Simpson, T. W. Jenkins, J. D. Bullington, M. D. McHam, and A. B. Wynne, each and all of whom were severally face to face with the defendant and duly examined, tried, and sworn according to law, the defendant being accorded the privilege of participating in the examination as to the competency and qualification of each of said persons to sit as a juror in said cause, and of peremptorily challenging not exceeding twenty of said list of jurors, and the above-named five persons, each of whom had first been accepted by the Government and tendered to the defendant for acceptance or rejection, were accepted by the defendant and duly sworn as jurors to try this cause. The venire having been exhausted by challenge and otherwise, the court ordered the marshal to summons fifty tales jurors in this cause to be and appear in the court room at 10 o'c. a. m. to-morrow, and the further consideration of this cause was postponed until to-morrow, and the above-named five persons so selected and sworn were placed in charge of a duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid at the court rooms of said court in the city of Paris, on Thursday, the 18 day of April, A. D. 1901, present, the honorable
9 D. E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } No. 2027. District court, criminal docket.
vs.
SOLOMON HOTEMA. }

This cause coming on this day to be further heard, came the United States by her attorney and the defendant Solomon Hotema, in his own proper person and by attorney appeared, and thereupon came the five named persons, to wit: T. J. Simpson, T. W. Jenkins, J. D. Bullington, M. D. McHam, and A. B. Wynne, who were on a previous day of this term of court duly examined, tried, sworn, and accepted, both by the Government and the defendants, as jurors in this cause, and also came the 50 tales jurors, ordered by the court to be present this day, having been duly summoned by the marshal of this court, from which said tales jurors came Jack Moore, Paul Nichols, A. T. Galbraith, J. H. Lloyd, J. C. McKinney, A. P. Henderson, and R. C. Bragg, each and

all of whom were severally face to face with the defendant and duly examined, tried, and sworn according to law, and were each and all of them accepted, both by the Government and the defendants, as jurors in this cause; and thereupon the said T. J. Simpson, T. W. Jenkins, J. D. Bullington, M. D. McHam, and A. B. Wynne, who had been selected on a previous day of this term of court, and the said Jack Moore, Paul Nichols, A. T. Galbraith, J. H. Lloyd, J. C. McKinney, A. P. Henderson, and R. C. Bragg, each and all of whom were severally face to face with the defendant, were duly examined, tried, empanelled, and sworn as required by law as a jury to try this cause, the defendant being
10 accorded the privilege of participating in the examination as to the competency and qualifications of each juror and of peremptorily challenging, not exceeding twenty, of the list of jurors and tales jurors, all of whom had first been accepted by the Government and tendered to the defendant for acceptance or rejection, and then came on to be heard by the court the demurrer of the Government to the special plea of the defendant, duly filed herein; and the court having heard the argument of counsel thereon is of the opinion that the law is with the demurrer and the same is sustained by the court, and the jury having heard the plea of defendant—that is, of "not guilty," and a portion of the evidence, when the hour of adjournment being at hand, the further consideration hereof was postponed until to-morrow, and the jury was committed to the custody of the marshal in charge of a sworn bailiff, after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Friday, the 19 day of April, A. D. 1901, present, the honorable D. E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES)
vs. No. 2027. District court, criminal docket.
SOLOMON HOTEMA.)

11 This cause coming on this day to be heard, came the United States by her attorney and the defendant Solomon Hotema, in his own proper person and by attorney appeared, and thereupon came the jury of twelve good and lawful men, who were on a former day of this term of court duly examined, empanelled, and sworn according to law to try this cause; and the hearing of the evidence was resumed before the court and jury and in the presence of the defendant, and the same was concluded when the hour of adjournment having arrived, the further consideration of this cause was postponed until to-morrow, at 9 o. c. a. m., and the jury was continued in charge of the duly appointed and sworn baliff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Saturday, the 20th day of April, A. D. 1901, present, the honorable

D. E. Bryant, judge presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } vs. } No. 2027. District court, criminal docket.
SOLOMON HOTEMA. }

This cause coming on this day to be further heard, came the United States by her attorney and the defendant Solomon Hotema, in his
12 own proper person and by attorney appeared, and thereupon came the jury of twelve good and lawful men, to wit: T. J. Simpson, T. W. Jenkins, J. D. Bullington, M. D. McHam, A. B. Wynne, Jack Moore, Paul Nichols, A. T. Galbraith, J. H. Lloyd, J. C. McKinney, A. P. Henderson, and R. C. Bragg who were on a former day of this term of court duly examined, tried, empanelled, and sworn according to law to try this cause, and the argument of counsel was begun before the court and jury and in the presence of the defendant, and the same was concluded and the jury received the charge of the court and retired to consider of their verdict; and no verdict having been received up to the hour of adjourning, the further consideration of this cause was postponed until 10 o. c. a. m., Monday, and the jury was continued in the charge of the duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Tuesday, the 23rd day of April, A. D. 1901, present, the honorable D. E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } vs. } No. 2027. District court, criminal docket.
SOLOMON HOTEMA. }

This cause coming on this day to be heard, came the United States
13 by her attorney and the defendant, Solomon Hotema, in his own proper person and by attorney, appeared and thereupon came the jury of twelve good and lawful men, to wit: T. J. Simpson, T. W. Jenkins, J. D. Bullington, M. D. McHam, A. B. Wynne, Jack Moore, Paul Nichols, A. J. Galbraith, J. H. Lloyd, J. C. McKinney, A. P. Henderson, and R. C. Bragg, who, having been at a former day of this term of court duly tried, impaneled, and sworn as required by law, and having heard at a former day of this term of court the plea of the defendant, the evidence, and the argument of counsel, and received the charge of the court, retired to consider of their verdict, and on this day came into open court and represented to the court that no agreement can be reached by the jury, and the court, being satisfied that the jury can not agree, and the defendant in person and by attorney agreeing thereto, a mistrial is herein declared and the jury discharged.

14 In the district court of the United States for the eastern district of Texas.

UNITED STATES
vs.
SOLOMON HOTEMA.

Now comes M. C. McLemore, United States attorney for the eastern district of Texas, prosecutin' the pleas of the Government and demurs to the special plea of former jeopardy filed herein by the defendant and says the same is insufficient in law: Wherefore the Government prays judgment of the court that said special plea be stricken out and held for naught.

M. C. MCLEMORE,
United States Atty.

1st. For special exception to said plea the Government demurs thereto because said plea fails to state or show that he has heretofore been tried or acquitted for the same offense charged in the bill of indictment, upon which he is now placed on trial.

2. Further specially demurring the Government says that said special plea fails to state or show that he has ever been tried or acquitted for the murder of Vina Coleman, with whose murder he now stands charged.

3d. Further specially excepting the Government says that said special plea fails to show that the offense for which he was heretofore acquitted was committed at the same time or place as that charged in the indictment upon which he is put on trial.

4th. Said plea is bad, because it only shows that the offense of which he was acquitted and that charged in the indictment was committed on the same day.

M. C. MCLEMORE,
United States Attorney, Eastern District of Texas.

(Endorsed:) United States *vs.* Solomon Hotema. Demurer. Filed April 18th, 1901. John B. Dailey, clerk.

15 Be it remembered, that upon the 3d Monday in November, A. D. 1901, the same being the 18th day of November, A. D. 1901, there was begun and held in the United States court-house in the city of Paris, Texas, a regular term of the honorable the district court of the United States for the eastern district of Texas at Paris.

Present and presiding, the honorable David E. Bryant, United States district judge for said district; also present, Marcus C. McLemore, esq., U. S. district att'y, and H. B. Birmingham, esq., and Frank Lee, esq., his assistants; John Grant, United States marshal, and John B. Walter, his deputy, and John B. Dailey, clerk, when the following proceedings were had, to wit:

Be it remembered, that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Wednesday, the 20 day of November, A. D. 1901, present the honorable D. E.

Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES
vs. } No. 2027. District court, criminal docket.
SOLOMON HOTEMA.

This cause coming on this day to be heard, came the United States by her attorney and announced ready for trial, and the defendant, Solomon Hotema, in his own proper person and by attorney, appeared and announced ready, and the said defendant being arraigned at a former term of
16 this court, and thereupon came a jury of twelve good and lawful men, to wit: J. H. Fitch, W. A. Williams, Herman Simms, W. R. Hunt, J. A. Phillips, J. W. Roberts, D. W. Braden, E. Neighbors, H. D. W. Patterson, Sam Alexander, George Jones, and Knox Smith, each and all of whom were severally face to face with the defendant and duly examined, tried, empanelled, and sworn as required by law to try this cause, the defendant being accorded the privilege of participating in the examination as to the competency and qualifications of each juror and of peremptorily challenging not exceeding twenty of the list of jurors, each and all of whom had first been accepted by the Government and tendered to the defendant for acceptance or rejection, and the hour of adjournment having arrived, the further consideration of this cause was postponed until to-morrow, and the jury was committed to the custody of the marshal, in charge of a sworn bailiff, after having been duly cautioned and instructed by the court.

Be it remembered, that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Thursday, the 21 day of November, A. D. 1901, present the honorable David E. Bryant, judge, presiding, the following, among other proceedings, were had, to-wit:

THE UNITED STATES
vs. } No. 2027. District court, criminal docket.
SOLOMON HOTEMA.

This cause coming on this day to be heard, came the United
17 States, by her attorney, and announced ready for trial; and the defendant, Solomon Hotema, in his own proper person and by attorney, appeared; and thereupon came the jury of twelve good and lawful men, who had been duly tried, examined, empanelled, and sworn on yesterday in this cause; and one of the jurors, to wit, J. H. Fitch, heretofore selected in this cause, having been taken sick, announced in open court that he was unable to sit as a juror in this cause on account of said sickness. Then came the defendant in his own proper person, and by attorney, on written motion duly filed herein, requested the court that said J. H. Fitch, the sick juror, be excused, and another juror selected and empanelled in his place and stead; and the court having heard said motion, granted same; and the regular venire having been exhausted the court ordered the marshal to summons 15 tales jurors; and the same having been duly summons by the marshal appeared in court, and from their

number came Jim Brand, face to face with the defendant, and having been duly examined, tried, and sworn, according to law, was selected and accepted both by the Government and the defendant as a juror in this cause; and thereupon came W. A. Williams, Herman Simms, W. R. Hunt, J. A. Phillips, J. W. Roberts, D. W. Braden, E. Neighbors, H. D. W. Patterson, Sam Alexander, George Gones, and Knox Smith, selected on yesterday as jurors in this cause, together with the said Jim Brand, and were duly sworn and empannelled as the jury in this cause. Then came on to be heard the demurrer of the Government to the special plea of the defendant duly filed herein, and the court

18 having heard the argument of counsel thereon is of the opinion that the law is with the demurrer, and the same is sustained by the court; thereupon the defendant entered his plea of "not guilty," and a portion of the evidence having been heard, the hour of adjourning having arrived, the further consideration of this cause was postponed until to-morrow, and the jury was continued in the charge of a duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid at the court rooms of said court in the city of Paris on Friday, the 22 day of November, A. D. 1901, present, the honorable David E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } No. 2027. District court, criminal docket.
vs.
SOLOMON HOTEMA. }

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial; and the defendant, Solomon Hotema, in his own proper person and by attorney, appeared; and thereupon came the jury of twelve good and lawful men, to wit, who were on a former day of this term of court duly examined, empanelled, and sworn according to law to try this cause; and the hearing of the evi-

19 dence was resumed before the court and jury and in the presence of the defendant, and the evidence not having been concluded, the hour of adjournment having arrived, the further consideration of this cause was postponed until to-morrow, and the jury was committed to the charge of a duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid at the court rooms of said court in the city of Paris on Saturday, the 23d day of November, A. D. 1901, present, the honorable David E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES } No. 2027. District court, criminal docket.
vs.
SOLOMON HOTEMA. }

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial; and the defendant, Solomon

Hotema, in his own proper person and by attorney, appeared; and thereupon came the jury of twelve good and lawful men, who were on a former day of this term of court duly examined, empanelled, and sworn according to law to try this cause; and the hearing of the evidence was resumed before the court and jury and in the presence of the defendant, and the same was concluded and the argument of counsel was begun in the presence of the court, of the jury, and of the defendant, and the same not having been concluded when the hour of adjournment having
20 arrived, the further consideration of this cause was postponed until Monday morning, and the jury was continued in the charge of a duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid at the court rooms of said court in the city of Paris on Monday, the 25th day of November, A. D. 1901, present, the honorable David E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
SOLOMON HOTEMA. } No. 2027. District court, criminal docket.

This cause coming on this day to be heard, came the United States, by her attorney, and announced ready for trial; and the defendant, Solomon Hotema, in his own proper person and by attorney, appeared; and thereupon came the jury of twelve good and lawful men, who were on a former day of this term of court duly examined, empanelled, and sworn according to law to try this cause; and the argument of counsel having been continued and concluded in the presence of the court, jury, and the defendant, and the jury having received the charge of the court, retired to consider of their verdict, and no verdict having been received up to the hour of adjourning, the further consideration of this cause was postponed until 9 o'clock a. m. Tuesday morning, and the jury was con-
21 tinued in charge of a duly appointed and sworn bailiff after having been duly cautioned and instructed by the court.

Be it remembered that, at a regular term of the district court of the United States for the eastern district of Texas, held in and for the district aforesaid, at the court rooms of said court, in the city of Paris, on Tuesday, the 26th day of November, A. D. 1901, present the Honorable David E. Bryant, judge, presiding, the following, among other proceedings, were had, to wit:

THE UNITED STATES
vs.
SOLOMON HOTEMA. } No. 2027, district court, criminal docket.

This cause coming on this day to be heard, came the United States by her attorney, and announced ready for trial, and the defendant, Solomon Hotema, who was on a former day of this term of court duly arraigned in this cause and pleaded not guilty, in his own proper person and by attorney appeared, and thereupon came the jury of twelve good

and lawful men, to wit, W. A. Williams, Herman Simms, W. R. Hunt, J. A. Phillips, J. W. Roberts, D. W. Braden, E. Neighbors, H. D. W. Patterson, Sam Alexander, George Jones, Knox Smith, and Jim Brand, each and all of whom were on a former day of this term of court, face to face with the defendant herein, duly examined, tried, empanelled, and sworn according to law to try this cause, the defendant being present and accorded the privilege of participating in the examination as to
22 the competency and qualification of each juror and of peremptorily challenging not exceeding twenty of the list of jurors, each of whom had first accepted by the Government and tendered to the defendant for acceptance or rejection, and the hearing of the evidence and argument of counsel having proceeded before the court and jury and in the presence of the defendant, from day to day, and the jury having heretofore received the charge of the court on a former day of this term of court, in the presence of the court, and retired to consider of their verdict, now, on this day, brought into open court their verdict in words and figures following, to wit: "We, the jury, find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman in the Indian Territory, as charged in the within indictment.

"SAM. G. ALEXANDER, *Foreman.*

"PARIS, TEXAS, *November 26th, 1901.*"

It is, therefore, considered by the court that the defendant, Solomon Hotema, is guilty of the murder of Vina Coleman, in the Indian Territory, as charged in the indictment and as found by the jury, and it is ordered that he be remanded to the custody of the marshal to await the judgment and sentence of the court.

FRIDAY, *November 29th, A. D. 1901.*

23 Court met pursuant to adjournment. Present and presiding, the Honorable David E. Bryant, judge. Also present, M. C. McLemore, U. S district attorney; H. B. Birmingham, esq., and Frank Lee, esq., his assistants; John B. Walter, deputy U. S. marshal, and John B. Dailey, clerk, when the following proceedings were had, to wit:

THE UNITED STATES } 2027.
vs.
SOLOMON HOTEMA. }

This day coming on to be heard the motion of the defendant, duly filed herein, for a new trial in this cause, and the defendant being present in open court in person and by attorney, and the court, having heard the said motion and the argument thereon both by the attorneys for the defendant and by the attorneys for the United States, is of the opinion that the said motion should be overruled, and it is accordingly so ordered; to which action of the court the defendant in open court excepts.

Judgment and sentence.

THE UNITED STATES }
vs.
SOLOMON HOTEMA. }

On motion of M. C. McLemore, esq., attorney of the United States for the eastern district of Texas, the above-named defendant, Solomon

Hotema, was this day brought to the bar of the court in custody of the marshal, and being asked by the court if he had anything to say why
24 the judgment and sentence of the court should not be pronounced upon him in accordance with the verdict of the jury rendered in this cause on the 26th day of November, A. D. 1901, and the law in such cases made and provided, and no good cause being shown why the judgment and sentence of the court should not be pronounced herein, it is therefore considered by the court that the defendant, Solomon Hotema, is guilty of murder as charged in the indictment and found by the jury; and it is ordered, adjudged, and decreed by the court that the defendant, Solomon Hotema, be now remanded to the custody of the marshal and be by him committed to the county jail of Lamar County, Texas, and there kept securely confined until Friday, the 14th day of February, A. D. 1902, when, between the hours of 10 o'c. a. m. and 4 p. m. of said day, he, the said Solomon Hotema, shall be taken therefrom by the marshal of the United States for this district to the yard of the said jail and there be, by the marshal aforesaid, hanged by the neck until he, the said Solomon Hotema, is dead. And the clerk of this court is ordered to issue a death warrant, directed to the marshal aforesaid, directing the due execution of this judgment and sentence according to law.

25 THE UNITED STATES } Pending in the United States court at
vs. Paris, Texas.
SOLOMON HOTEMA. }

Now comes the defendant in the above-entitled cause and prays the court to make an order giving defendant sixty days in which to file petition for writ of error to the Supreme Court of the United States from the conviction & sentence of death of this court. Deft. now desires to follow his notice of appeal with a writ of error to the Supreme Court, and therefore prays for time as above mentioned, because this is *is* next to the last day of the present term and the record is voluminous and requires quite amount of work to prepare record.

J. C. HODGES &
J. M. LONG,
Attys. for Deft.

(Endorsed:) The United States vs. Solomon Hotema. Motion for time in which to file petition for writ of error. Filed Nov. 29, 1901. J. B. Dailey, clerk, by H. H. Kirkpatrick, deputy.

UNITED STATES }
vs. } 2027.
SOLOMON HOTEMA. }

Upon the written motion of the defendant, duly filed herein, it is ordered by the court that the defendant herein have sixty days from the expiration of this term of court to file bill of exceptions, application for writ of error, assignment of errors, and all proceedings requisite to perfect writ of error.

26 In the United States district court for the eastern district of Texas, at Paris.

UNITED STATES *vs.* SOLOMON HOTEMA. } No. 2027.

Bill of exceptions.

April term, 1901.

Be it remembered that on the 4th day of April, 1900, the grand jury, duly summonsed, qualified, and empanelled by the United States court of the Indian Territory, holding sessions at Antlers, in said Territory, returned into open court an indictment in due form charging Solomon Hotema with the murder of one Vina Coleman on the 14th day of April, 1899, in the central district of the Indian Territory. On April 9th, 1900, defendant, Solomon Hotema, filed application to change the venue of said case to the eastern district of Texas, upon a hearing of which an order was duly and legally entered changing the venue of said cause from Antlers, Indian Territory, to the United States court at Paris, Texas. On the 20th day of November, 1901, said cause was called for trial in the United States court at Paris, Texas, whereupon the Government announced ready for trial, and the defendant presented his special plea as follows, to wit:

UNITED STATES *vs.* SOLOMON HOTEMA. } No. 2027. Pending in the United States court at Paris, Texas.

Now comes the defendant, Solomon Hotema, and for special plea herein says, on oath, that there was three indictments filed in this court charging him with the crime of murder of different persons; that two

27 of the cases, viz, Nos. 2024 and 2025, were consolidated and tried in this court, and on the — day of April, 1901, the jury returned a verdict of not guilty, which was received by the court and the jury discharged. Affiant further shows that the only defense he or his counsel offered on the trial of said case was a plea of insanity. Defendant on the trial of said case admitted the killing charged in all three of said indictments, and as a defense affirmed that at the time of the killing he was suffering from such a diseased condition of the brain as that he did not have the mental capacity to commit murder. The only issue made in the case was whether affiant was sane or insane at the time he killed the three persons. The jury found the defendant not guilty on said issue. Affiant alleges further that each and every fact that he now remembers of that would be admissible on the trial of this cause was offered on the trial aforesaid; at least proof was offered on every issue that can arise in this case. That the witnesses who testified in the other case are witnesses in this case, and will swear to same as in the case tried. That these three persons are charged to have been killed on the same day; that on the said trial every circumstance connected with the killing charged in this case was proved on the other trial. Affiant says by reason of the facts herein stated he has been once in jeopardy upon the same identical case and issue now to be tried. That a jury in this case under affiant's plea

of insanity will be compelled to make their verdict upon the same evidence and the same issue the jury found the defendant not guilty on in cases Nos. 2024 and 2025 tried in this court, and verdict rendered on — day of April, 1901. Wherefore defendant pleads former jeopardy and says this court can not again arraign and try defendant upon said issue without depriving defendant of his constitutional rights, which plea was signed and sworn to by the defendant.

28 1st. The United States attorney demurred generally and specially to said plea. The court sustained the demurrer, to which defendant, by his counsel, excepted, and as grounds for so doing stated, first, that the plea, if true, was a complete bar to a second prosecution upon the issues joined between the United States and the defendant. The court required the defendant to go to trial on the general issue. A jury of twelve good and lawful men was legally empaneled to try said case, and the indictment against the defendant had been read to said jury. Defendant, by his attorney, said "not guilty," and stated while he did not deny the killing he was insane at the time of the homicide, and therefore not amenable to the law for the offense of murder as charged in the indictment.

2nd. After all the evidence was offered, defendant's counsel moved the court to allow the defendant's counsel to open and conclude the argument, because the only issue before the jury was the condition of the defendant's mind at the time of the homicide. The defendant had assumed the burden of proving that his mind was unsound to such an extent as that he did not know right from wrong as to the particular act he was charged with at the time he did the act. This motion was overruled by the court, and counsel for the Government allowed to open and conclude, to which ruling the defendant excepted.

3rd. After the court gave his charge to the jury, and before the jury retired to consider their verdict, the defendant's counsel excepted to the following portions of the charge of the court: "The most usual illustrations and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administering of poison for the purpose of taking life, because in such instances the act

29 clearly shows the formed design and the unlawful intent and its execution. And therefore it is said to be a killing upon express malice. These are only illustrations of what is meant by the term express malice, and any homicide that is shown to have been the result of willful intent and committed without legal excuse is said to be a killing upon 'express malice,' because there is no evidence before the jury as to the administration of poison and lying in wait, and it is not a correct definition of express malice."

4th. Defendant excepted to the following language in the court's charge: "Therefore, in this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing." Defendant claims that this is error, because the want of motive is material, and the jury should consider the fact that the evidence showed no motive for the killing. The evidence shows undisputed that the defendant had been, and was at the time of the killing, a good friend and relative of the deceased, which should be con-

sidered by the jury in determining the issue as to the defendant's sanity at the time of the homicide.

5th. Defendant excepted to the following language: "The jury does not assess the punishment in this court. They only find whether the defendant is guilty or not guilty, and a party convicted of murder is punishable by death, unless the jury adds to their verdict 'without capital punishment,' in which event the party is imprisoned for life." Defendant claims this is error because not the law in any murder case; the statute makes it the duty of the jury to assess the punishment by their verdict. Second, because the language is inconsistent with itself. The jury should be instructed in plain language that in this case they alone have the power to fix or assess the punishment should they find the defendant guilty.

30 6th. Defendant excepted to the following language in the charge: "If it is true the defendant took the life of Vina Coleman as charged in the indictment, and at the time said act was committed the mental and physical faculties of said defendant were beyond his control, or if some controlling mental or physical disease was in truth the acting power within him, which he could not resist, and he was impelled without intent, reason, or purpose, he would not be accountable to the law." Defendant claims that this is error because he has not plead impulsive insanity producing uncontrollable physical action. Defendant does not claim that he could not control his physical faculties. Defendant's defense is delusive insanity, which caused him to act with great deliberation in taking the life of Vina Coleman under the delusive thought that God had commanded him to do the deed. Second, said charge does not fix the legal test of responsibility in the case under the plea and proof.

7th. Defendant excepted to the following language in the court's charge: "If you find from the evidence, beyond a reasonable doubt, that the defendant killed Vina Coleman as charged in the indictment, and if you further find that his brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience, and judgment, and that the defendant in committing the act acted from an irresistible and uncontrollable impulse, or if you have a reasonable in regard thereto, then he would be guiltless, and would be entitled to be acquitted." Defendant claims this is error because the word brain is used instead of mind, and makes the defendant's right to be acquitted depend on an insane brain instead of a condition of the mind.

Second. The jury could not under said charge acquit the defendant unless they believed that he acted from an irresistible and uncontrollable impulse in taking the life of Vina Coleman.

Third. The charge does not submit the defense relied upon by the defendant, viz, delusive insanity.

31 8th. Defendant excepted to the foll'ing language in the court's charge: "The real test, as I understand it, of liability or nonliability rests upon the proposition, whether, at the time the homicide was committed, Hotema had a diseased brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will-power, judgment, reflection, and control/ of his mental faculties

were so impaired that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition he can not be punished by law." Defendant claims this is error because it makes the defendant's guilt depend solely upon the condition of his brain instead of the mind. Second, the charge makes the guilt of the defendant depend upon whether or not the defendant was or not laboring under the influence of impulsive insanity at the time he killed the deceased. Third, said charge is inconsistent with the law, not warranted by the evidence, places the burden on the defendant to show that not only was his mind diseased to such an extent that he did not have mental capacity to form a criminal intent, but must show in addition to such want of mental capacity that the disease had so taken charge of his brain, and had so impelled it, etc. The jury should be instructed to inquire as to the condition of defendant's mind, not brain.

9th. The defendant excepted to the following language in the court's charge: "The evidence shows that the defendant Hotema is an Indian, and that he is a man of intelligence and education, and it is undisputed in this: That he is a man of more than ordinary ability as com-
32 pared with other members of his tribe. The Government has introduced some evidence in regard to the defendant drinking whiskey about the time the homicide is said to have been committed, and contends that the defendant was not insane but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land, and had stated to a witness 'that he desired him to tell the truth in regard to the matter,' and from this evidence insists that Hotema was not insane, but was aware of the act he was committing, and also aware of the fact that it was wrong. Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case on both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he drunk, if any." Defendant claims that this is error because, first, on the weight of the evidence, and virtually tells the jury that defendant is a sane man; second, because no witness has testified to such declarations from the defendant; third, because it called the jury's attention to criminating evidence and instructed them to consider said evidence in determining whether or not defendant was insane, which evidence was never offered; no witness had used the language or substance of the language the court used in his charge.

10th. The defendant excepts to the following language of the court's charge: "There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to
33 the evil influences of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that Hotema believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught,

and that he acted upon that belief thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the same time he knew that it was a violation of human laws, and he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and being so, would not excuse him from the consequences of his act. And also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both these were the sole inducements that caused him to do the act, he would not be guiltless, and would be responsible therefor." Defendant claims this was error because said charge makes the defendant's right to an acquittal under his special plea depend upon what caused his insanity, if insane. If from the use of intoxicating liquors alone defendant's mind was so diseased that he believed he had a right to kill the deceased, yet he will be guilty. The charge does not confine such use of liquors to recent use. In this connection the evidence undisputed showed that the defendant was an educated man of much superiority over his race; that he was a teacher, a lawyer, and a preacher; that he preached good logical sermons which could be readily understood, and that about ten days or two weeks before the homicide his clerical brethren discovered that he was preaching the witchcraft heresies, and in talking to them he declared that witches were causing great trouble among
34 his church and people, and that he really believed that the same evil spirits which existed in the days of Pharaoh now existed among his people.

11th. Defendant excepted to the following language in the charge: "Did Hotema commit the homicide not laboring under an insane delusion, but believing by the teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief and was not laboring under an insane delusion. If you believe this state of case existed you will find the defendant guilty as charged in the indictment." Defendant claims this is error because it fails wholly to define insane delusion and distinguish between sane and insane delusions. Second, the charge states a case of undoubted insane delusion, and then tells the jury if they believe such case did exist in Hotema's case they would convict him. Third, this charge deprives the jury of their right to find from all the evidence before them whether the defendant was sane or not at the time of the homicide, but forces them to make a verdict upon certain ideas the court entertained as to what state of facts would prove that the defendant was laboring under insane delusions.

12th. Defendant excepted to the following in the charge of the court: "If you find the defendant guilty the form of your verdict will be: We, the jury, find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman in the Indian Territory, as charged in the indictment. Date it and sign it by your foreman."

13th. The defendant requested the following instruction: "If from all the evidence before you in this case you believe that the defendant, Solomon Hotema, at the time he shot and killed Vina Coleman was laboring

under such mental condition that he did not have sufficient mental
35 capacity to and did not know it was wrong to kill said Vina as he did kill her, and you further believe this condition of the defendant's mind was not produced by the recent use of intoxicating liquors, then he is entitled to be acquitted." This charge was refused by the court, to which the defendant excepted because the evedence before the jury demanded such an instruction. Second, because the court's charge restricted the jury and required them to find a verdict of guilty upon a state of case upon which the law and the evedence does not demand a conviction.

14th. After the jury retired and deliberated for a reasonable time they returned into open court the following verdict: We, the jury, find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman in the Indian Territory, as charged in the indictment," which verdict was received and filed. Defendant filed a motion for new trial as follows:

36 THE UNITED STATES } No. 2027. Pending in the United States
vs. court at Paris, Texas.
SOLOMON HOTEMA. }

Now comes the defendant, Solomon Hotema, and prays the court to grant him a new trial herein for the following causes, viz:

1st. Because the court erred in sustaining the motion of the Government to strick' out defendant's special plea of former je'perdy, which said plea is a part of the record in this case and refer'ed to as a part of this motion, as shown by defendant's bill of exceptions.

2d. The court er'ed in refusing to allow expert witnesses for the defendant to tell the jury the reason why said expert witnesses believed that the defendant was insain' at the time he committed the alleged homoside, as shown by defendant's bill of exceptions.

3rd. The court er'ed in refusing to allow counsel for the defendant to open and conclude the argument in this case. Defendant had assumed the burthen of showing by evidence that he was insain' at the time he killed the alleged deceased, Vina Coleman. The sanity of the defendant at the time of the admit'ed killing was the sole and only issue for the jury to determine by their verdict. Hence he should have been allowed to open and conclude the argument by himself, or counsel, or both.

4th. The court er'ed in its charge to the jury in the following particulars, viz: 1st. In the use of the following language, "Defendant claims in his special plea" that such homocide was the result of an uncontrollable and irresistible impulse." This charge is error and calculated to missdead the jury. The defendant did not plead as a defense impulsive insanity,
but he plead delusive insanity, and claimed that he acted with
37 deliberation, under inspiration from God, as he believed God had commanded him to do; that the act of killing was not defendant's act, but the act of God, under a direct command from God.

2d. The court er'ed in the following language: "The most usual illustrations and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life." The facts in the case did not demand such illustration to define express malice.

3d. The court er'ed in its instructions to the jury in using the following language: "The jury does not assess the punishment in this court; they only find whether the defendant is guilty or not guilty." This charge was error, because the jury do'se assess the punishment in all capital convictions in the Federal courts. The statutes of the United States make it the duty of the trial court to submit the question of punishment to the jury in such cases. They alone have the power to assess the punishment. In case of a capital conviction they by their verdict say whe*a*ther the judgment of the court shall adjudge the convicted prisoner to be hanged or imprisoned for life as a punishment for the crime of which he has been convict'. Hence error, which error defendant now claims misled the jury and caused them to return a verdict of guilty in such form that this court is now compelled to adjudge defendant guilty as found by the jury, and sentence defendant to death by hanging by the neck until dead, or set aside the verdict and
38 judgment in this case and grant defendant a new trial.

4th. The court er'ed to the injury of defendant in using the following language *language:* "In this case it is not material so far as the question of guilt or innocence is concerned that the evidence fails to show any motive for the killing." This instruction in effect tells the jury that so far as the question of guilt or innocense of the defendant is concerned they should not consider the evidence that proved a want of motive and the evidence which showed the love defendant had for the deceased and the evidence which showed how kind deft. had always been to the dec'd. This evidence and the fail*er* of the evidence was a material matter to be considered in determining the guilt or innocence of the defendant, the want of motive and the evidence of defendant's love for the dec'd Vina Coleman were facts relied on by the defense to prove that the defendant was not respons*a*ble for what he had done, and the charge was well calculated to injure defendant

5th. The court er'ed in the use of the following language in its charge: "The Government has introduced some evidence in regard to the defendant drinking whisky about the time of the homocide is said to have been committed, and contends that the defendant was not insane but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land and had stated to a witness that he desired him to tell the truth in regard to the matter."

This charge is error because it called the attention of the jury to
39 evidence that had never been offered on the trial of the case. No witness testified on the trial that deft. ever used the words the court used in its charge. If such evidence had been offered it would have had a tendency to prove that the deft. knew that he was committing a crime at the time he killed Vina Coleman. The court called the attention of the jury to the evidence which the court thought had been offered before the jury as evidence which showed that the defendant did know that he was committing a crime at the moment he killed dec'd. The connection in which the court used the language complained of shows that the court intended by the charge to call the attention of the jury to such statement of the defendant as tending to show that defendant was not insa*in* at the time he slew the dec'd. In this connection the court said to the jury, "And from this evidence insists that Hotema was not insane,

but was aware of the act he was committing, and also aware of the fact that it was wrong." Then by instructing the jury the Government relied on certain criminating evidence which was never in fact before the jury.

6th. The court er'ed throughout the entire charge in the use of the words "of sound brain" instead of the words "of sound mind."

7th. The court er'ed in all that part of its charge which refers to the defendant's belief in witches and witchcraft and the teachings of the Bible. This charge is not *not* authorised by the undisputed evidence offered on the trial. In this the evidence showed beyond any doubt that the defendant had not taught or believed in witches. On the contrary, the
40 undisputed evidence showed he had taught the contrary for years and up to within eight or ten days of the time of the homocide, which fully appears from defendant's bill of exceptions, which is here referred to and prayed to be considered as a part of this motion. 2d. Said charge is error because it in effect instructs the jury that although they might believe from the evidence that the defendant was laboring under such delusion that he did not know it was wrong to kill Vina Coleman, yet, if such delusion was the result of investigation and research, they should find defendant guilty, notwithstanding they believed he did not know right from wrong. Whatever may have been the prisoner's singularities and eccentricities, he was entitled to an affirmative instruction to the effect that if the jury had a reasonable doubt that he possessed at the time of the homocide sufficient mental capacity to know it was wrong to kill Vina Coleman, or was deprived of that capacity by mental diseases, then he should be acquitted. And in this connection the jury should have been told that it made no differen*t* what caused the condition of the defendant's mind if it was in fact so far diseased as that the defendant did not know *w*right from wrong as applied to the act he was doing.

8. The charge of the court all taken together does not tell the legal rule to govern them in determining the condition of the defendant's mind.

9th. All that part of the charge that calls the mind of the jury to the physical condition of the defendant at the time of the homicide is
41 error because it was his mental status and not physical that must be looked to to determine his responsibility to the law.

10. The verdict is not supported by the evidence. The testimony all taken together demanded a verdict of not guilty.

11th. There was no evidence upon which the verdict of guilty and judgment of the court can be maintained.

12. Because the jury did not find and return the verdict upon which the judgment was rendered, the jury did not find a verdict authorizing the court to adjudge the defendant guilty of murder and sentence him to death, which fully appears from the affidavits of jurors hereto attached and made a part of this motion. Defendant refers to his bill of exceptions and asks that the same be considered a part of this motion. Wherefore defendant prays the court to set aside the verdict and judgment in this case and grant him a new trial, to the end that he may have an affirmative finding by the verdict of a jury before he is executed for the crime with which he is charged and was placed upon trial.

J. C. HODGES &
J. M. LONG,
Atty. for Deft.

(Endorsed) D. Cr. 2027 United States v. S. Hotema. Motion for new trial. Filed Nov. 29, 1901. J. B. Dailey, clerk. By H. H. Kirkpatrick, deputy.

42 The motion was heard on the 29th day of November, 1901, and in all things overruled, and sentence pronounced against the defendant and entered of record fixing the date of execution on Feby. 14th, 1902, to all of which rulings and judgments the defendant then and there excepted in open court, and gave notice of appeal to the Supreme Court of the United States. Defendant filed motion for sixty days in which to prepare petition for writ of error and assignments of error, which was allowed and entered of record.

This bill of exceptions is approved and ordered to be made a part of the record herein, with the following qualifications, to wit:

1st. Defendant's motion to be allowed to open and conclude was overruled, because the charge of the court distinctly placed the burden of proof throughout, and particularly upon the question of insanity, upon the Government.

2nd. As to the fourth paragraph of the defendant's bill, with reference to the question of motive in this case, the court was charging upon implied malice, and the entire clause of the charge, a portion of which is only given in the defendant's bill, was as follows: "By the term implied malice is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done, that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder
43 and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts."

3rd. As to the fifth paragraph of defendant's bill the court at page 3* of its charge instructed the jury, "The jury does not assess punishment in this court. They only find whether the defendant is guilty or not guilty, and a party convicted of murder is punished by death unless the jury adds to their verdict 'without capital punishment,' in which event the party is imprisoned for life," and at page 9† of the charge "If you find the defendant, Solomon Hotema, guilty, you can add to your verdict, if you see proper so to do, 'without capital punishment,' and in the event

* Page 53, record. † Page 57, record.

you find the defendant guilty, and see proper to do so, you can say, 'We the jury find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman in the Indian Territory, as charged in this indictment, but without capital punishment.'"

4th. As to the sixth paragraph of defendant's bill, there was no evidence in this case to show that the defendant acted under a direct command of God, and the court at page sixth* of its charge charged the jury upon the question of insane delusions, as well as upon page 5† thereof and elsewhere.

5th. As to the ninth paragraph of defendant's bill Bond Coleman, a witness for the Government, testified that immediately after had killed Vina Coleman the defendant said to persons then present:
44 "I now summon you all as witnesses." Riley Wilson, a Government witness, testified: That the defendant stated to him at Grant late that afternoon that he was going to Paris that night, a distance of about twenty miles, and then return and go to Antlers and surrender to the authorities, and the court at p. 8‡ of its charge told the jury that they would be "governed absolutely and entirely upon all questions of law by the charge I have given you, but upon questions of fact and their application to principles I have given you in charge that is entirely within your own control."

6th. As to the tenth paragraph of defendant's bill, there was no claim made in this case that the defendant's brain had become diseased from the continued use of ardent spirits, and the court in its charge at page six§ of its charge submitted this matter to the jury and expressly limited the use of liquors referred to therein to the recent use of liquors, as well as elsewhere in his charge.

7th. As to the eleventh paragraph of the defendant's bill, as before stated, the court repeatedly charged upon insane delusion as well as upon irresistable and uncontrollable impulse.

8th. As to the paragraph 12 of defendant's bill the court there gave the jury a form of verdict in the event they found the defendant guilty, and immediately followed that instruction with a direction as to the form of its verdict in the event they found the defendant not guilty. Charge of the court, p. 9.‖

9th. As to the thirteenth paragraph of defendant's bill the charge therein referred to is believed to have been fully covered by the general charge of the court.

Because defendant's counsel in taking his exceptions to the charge of the court has given only portions of a single paragraph in the charge, the court believes it necessary to the elucidation of this bill that the
45 entire charge shall go into the record, and has therefore ordered that that shall be done.

This January 27th, 1902.

D. E. BRYANT, *Judge*.

(Endorsed): No. 2027, The United States vs. Solomon Hotema. Bill of exceptions filed Jany. 27th, A. D. 1902. J. B. Dailey, clerk.

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* Page 54, record.
† Page 55, record.
‡ Page 53, record.
§ Page 56, record.
‖ Page 57, record.

46 UNITED STATES } Pending in the United States court at Paris,
v. Texas.
SOLOMON HOTEMA. }

GENTLEMEN OF THE JURY: The defendant, Solomon Hotema, was indicted in the United States court at Antlers, in the central district of the Indian Territory, on the 4th day of April, 1900, in which said bill of indictment said Hotema is charged with having in said central district on the 14th day of April, 1899, committed an assault on the person of one Vina Coleman by shooting her with a certain gun charged with gunpowder and leaden balls, and that the assault was made by firing and discharging the contents of said gun at, in, and upon the person of said Vina Coleman, inflicting upon her person a mortal wound, from which she then and there instantly died.

The case is pending in this court by removal as provided by law, and therefore it is properly triable in this court. As before stated, the charge against the defendant in this case is the murder of Vina Coleman. The defendant has been arraigned upon said indictment, and has plead "not guilty" to the same. By the defendant's plea of not guilty, the burden is placed upon the Government to establish his guilt by legal evidence beyond a reasonable doubt, and he is presumed to be innocent until his guilt is so established.

The defendant, Solomon Hotema, has interposed a special plea. He does not deny the killing of Vina Coleman, as charged, but he
47 pleads specially that at the time of the homicide charged he was laboring under an insane delusion, and that such delusion had so controlled and possessed him that he was incapable of committing a crime, and that such homicide was the result of an uncontrollable and irresistible impulse.

Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and in the peace of the United States, with malice aforethought, either express or implied. The term express malice means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term "express malice," are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the term "express malice," and any homicide that is shown to have been the result of willful intent and committed without legal excuse is said to be a killing upon express malice.

By the term "implied malice" is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful; that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the
48 act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life

without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts.

The jury does not assess punishment in this court. They only find whether the deft. is guilty or not guilty and a party convicted of murder is punishable by death unless the jury add to their verdict without capital punishment, in which event the party is imprisoned for life.

Every person, charged with crime, is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof.

49 No act done in a state of insanity can be punished as an offense.

The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists.

If it is true that the defendant took the life of Vina Coleman, as charged in the indictment, and, at the time said act was committed the mental and physical faculties of said defendant were beyond his control, or if some controlling mental or physical disease was in truth the acting power within him, which he could not resist, and he was impelled without intent, reason, or purpose, he would not be accountable to the law. If, on the other hand, his mind was sufficiently sound to be

50 capable of reasoning and knowing the act he was committing to be wrongful, and, knowing the consequences of the act, and had the mental capacity to resist and refrain from its commission, his plea of insanity would not avail him as a defense.

If you find from the evidence beyond a reasonable doubt that the defendant killed Vina Coleman, as charged in this indictment, and if

you further find that his brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience, and judgment, and the defendant in committing the act acted from an irresistible and uncontrollable impulse, or if you have a reasonable doubt in regard thereto, then he would be guiltless and would be entitled to be acquitted. Although a man may be laboring under a partial insanity, if he still understands the nature and character of his acts and their consequences, if he has a knowledge that it is wrong criminally, and a mind sufficient to apply that knowledge to his own case, and knows that if he does such act, he will do wrong and be responsible, such partial insanity is not sufficient to exempt him from the consequences of any criminal act done while in such condition.

I charge you that the burden is upon the Government throughout the entire case to prove every essential element of the case charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant, Hotema, was sane at the time of the commission of the act charged, you will acquit him. In determining
the question of whether or not Hotema was sane or insane at the
51 time he committed the act charged in this bill of indictment
it is your duty to take into consideration his mental condition before the commission of the act, at the time of the commission of the act, and his mental condition since that time, but the determining question is his real condition at the time the act was done, because, if sane before and sane since, he may have been insane at the time the act was done, or he may not have been insane, and it is material and legitimate for you to take into consideration his previous and subsequent mental condition in determining what his mental condition was at the time the homicide was committed. The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he can not be punished by law. But if his brain was not in this condition, he can be punished by law, remembering that the burden is upon the Government to establish that he was of sound mind, and by that term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong,
and knowing that the act he was committing at the time he was
52 performing it was a wrongful act in violation of human law and
he could be punished therefor, and that he did not perform the act because he was controlled by irresistible and uncontrollable impulse. In that state of case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him. But if you find from the evidence or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power to control his actions, but simply slew Vina

Coleman because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal.

The evidence shows that the defendant, Hotema, is an Indian, but that he is a man of intelligence and education, and it is undisputed in this that he is a man of more than ordinary ability as compared with other members of his tribe. The Government has introduced some evidence in regard to the defendant drinking whiskey about the time the homicide is said to have been committed, and contends that the defendant was not insane but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land, and had stated to a witness that he desired him to tell the truth in regard to the matter, and from this evidence insists that Hotema was not
53 insane, but was aware of the act he was committing, and also aware of the fact that it was wrong. Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. What I intend for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whiskey he had drunk; but in arriving at that conclusion the jury are to look to all the evidence, and, if from all the evidence, they are satisfied that he slew Vina Coleman by reason of the whiskey he had drunk, and not as the result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant, and acquit him. There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being effected by witches, and that the deaths that were occurring in the
54 neighborhood were due to the evil influence of witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant, Hotema, believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief thinking he had the right to kill the party he is charged with killing because he thought she was a witch, but at the time he knew it was a violation of human law and he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and being so, would not excuse him from the consequences of his act. And also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and also used spirituous liquors, and these two combined were the cause or causes that led him to the

commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon the other hand, I charge you that should you find from the evidence in this case that Solomon Hotema, the defendant, believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him.

55 In this case you are to determine the following questions:

1st. Was the defendant, Hotema, at the time he committed the homicide charged laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason, and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant and acquit him.

2nd. Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by the teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant.

You are further instructed as to the term "malice" that this term does not mean that the Government must prove any special ill will, hatred, or malice on the part of Hotema towards the deceased, Vina Coleman. Whenever a homicide is shown to have been committed without legal authority, and with deliberate intent, it is sufficiently proved to have been done with malice, and this evidence is

56 not answered, and malice is not disproved, by showing that the defendant had no personal ill will against the deceased person, but killed her from some other motive, such as the protection of his church or people.

Gentlemen, you will take this case and give it a careful and impartial investigation, such as the nature of the case demands. A high duty rests upon each juror, and his duty is to discharge it to the best of his ability. It is your duty to consider all the evidence in this case, both that offered by the Government and the defendant. Weigh it well, conscientiously, being governed absolutely and entirely upon all questions of law by the charge I have given you, but upon questions of fact and their application to principles I have given you in charge, that is entirely within your control, and you are the judges of the credibility of the witnesses and the weight of their evidence. It is your duty to seek for the truth as near as it is possible for human beings to do, being influenced thereto by no motive other than to conscientiously discharge your duty. If arising from all the evidence in this case you have a reasonable doubt

as to the mental capacity of the defendant, Hotema, to be held for violation of law, as above set forth, it is your duty to acquit him. But if the Government has established beyond a reasonable doubt that the defendant had such capacity to the extent as defined, it is your duty to convict him.

By the term "reasonable doubt" is meant that either from the evidence offered, or from the want of proof to sustain the guilt of
57 the defendant the evidence does not carry conviction to the mind to the extent that it satisfies it to the point where each juror would act upon it in the most important affairs of life that concerns him individually, and when he did act would act with confidence that he was correct. If the proof goes to this extent, reasonable doubt does not exist; but if the proof falls short of this, reasonable doubt does arise, and it is the duty of the jury to give the defendant the benefit of it whenever and wherever it so arises.

If you find the defendant guilty, the form of your verdict will be "We, the jury, find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman, in the Indian Territory, as charged in this indictment." Date it and sign it by your foreman.

If you find the defendant not guilty, the form of your verdict will be "We, the jury, find the defendant, Solomon Hotema, not guilty as charged in this indictment, because we have a reasonable doubt as to his sanity at the time the homicide was committed." Date it and sign it by your foreman.

If you find the defendant, Solomon Hotema, guilty, you can add to your verdict, if you see proper so to do, "Without capital punishment," and in the event you find the defendant guilty, and see proper to do so, you can say, "We, the jury, find the defendant, Solomon Hotema, guilty of the murder of Vina Coleman, in the Indian Territory, as charged in this indictment, but without capital punishment." Date it and sign it by your foreman.

D. E. BRYANT, *Judge.*

58 THE UNITED STATES }
vs. } No. 2027.
SOLOMON HOTEMMA. }

To the Hon. D. E. BRYANT,
United States Judge for the Eastern District of Texas:

Your petitioner, Solomon Hotema, defendant in the above case, respectfully shows to the court that heretofore, on 26th day of November, 1901, petitioner was convicted of the crime of murder in the United States court, eastern district Texas. On November 9th, 1901, petitioner's motion for a new trial was overruled by said court, and the judgment made final and petitioner sentenced to be executed on February 14, 1902.

Petitioner now shows to your hon. that on the trial of said cause there was manifest errors; that the conviction, judgment, and sentence was all manifestly wrong and did great injustice to petitioner; all of errors and wrongs of which petitioner now complains are shown in the record in said case and fully set out in petitioner's assignment herewith presented, and asked to be filed as a part of the record in said case. For the errors complained of petitioner desires to have the Supreme Court of the United

States review and correct all proceedings, judgments, and orders in said case made which were erroneous; wherefore your petitioner prays that a writ of error issue for the removal of said cause to the Supreme Court of the United States for review and reversal of the judgment entered in said case.

J. C. HODGES,
Atty. for Petitioner.

Allowed January 27th, 1902.

D. E. BRYANT,
Judge presiding at said trial.

(Endorsed:) No. 2027. The United States vs. Solomon Hotema. Petition for writ of error. Filed Jany. 27th, 1902. J. B. Dailey, clerk.

59 In the United States court eastern district of Texas, at Paris, Texas.

THE UNITED STATES)
vs.
SOLOMON HOTEMA.)

Now comes Solomon Hotema, def't in the trial court, and files this his assignment of errors, which he claims reasons for reviewing and reversal by the appellate court:

1st assignment. The court erred in sustaining the demurrer to defendant's plea of former jeopardy. Said plea, if true, was a bar to the prosecution. The plea alleged that defendant had been tried before a jury in the United States court at Paris, Texas, upon the same issue joined in this case, hence error to sustain a demurrer.

2nd. The court erred in refusing to allow the defendant to prove by Dr. Moody and others their opinions as to what produced the mental condition of the defendant at the time of the homicide, i. e., that his deranged and insane condition was, in their opinion, caused from defendant's physical condition, and not from reading the Bible, or traditional teachings and heredity.

3d. The court erred in refusing the defendant's counsel the right to open and conclude the argument. The defendant in his plea admitted the killing of the alleged deceased at the time and place charged in the indictment, and assumes the burden of showing that he was insane at the time of the killing. The sanity of the defendant at the time of the killing was the only issue for the jury to pass on, and the only one submitted to them in the court's charge, hence error to refuse the defendant the right to open and conclude the argument of the case.

4th. The court erred in using the following language: "The most
60 usual illustration and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he appears he is slain, or preparation and administering poison for the purpose of taken life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be a killing upon express malice." Error because there was no evidence before the court as to lying in wait, or preparing or administering poison. Said charge is not a correct definition of express malice.

5th. The court erred in using the following language in his charge: "In this case it is immaterial so far as the question of guilt or innocence that the evidence fails to show any motive for the killing." Error because the want of motive for the killing was material, and the jury should have considered the fact that the evidence wholly failed to show any motive on the part of the defendant for the killing. Def'ts bill of exceptions shows undisputed that the defendant was a relative and a warm friend of the deceased for many years up to and including the time of the killing; these facts should have been considered by the jury. The want of motive was a material inquiry for the jury to consider in whether defendant acted from an insane delusion in killing the deceased or from some motive which might constitute his act a crime. Hence error to tell the jury that the admitted fact of want of motive was immaterial in passing on the guilt or innocence of the defendant.

6th. The court erred in using the following language in his charge: "The jury does not assess the punishment in this court, they only find whether the defendant is guilty or not guilty, and a party convicted of murder is punishable by death unless the jury adds to their ver-
61 dict without capital punishment, in which event the *the* party is imprisoned for life. Error because not the law, but just the converse, the statutes of the United States make it the duty of the jury in every capital case to fix the punishment by their verdict," said charge is inconsistent with itself and other parts of the court's charge, and well calculated to cause the jury to conclude that the court finally fixed the punishment after conviction.

7th. The court erred in using the following language in its charge: "If it is true that the defendant took the life of Vina Coleman as charged in the indictment, and at the time said act was committed the mental and physical faculties of said defendant were beyond his control, or if some controlling mental or physical disease was in truth the acting power within him which he could not resist, and he was impelled, without reason or purpose, he would not be accountable to the law. Error because the defendant had not plead impulsive insanity as a defense; defendant did not claim that at the time of the said killing that he was controlled by such an uncontrollable impulse that he could not control his physical actions. The only defense relied upon by defendant was delusive insanity—that laboring under such insane delusion he acted deliberately in taking the life of Vina Coleman under the delusive and insane belief that God had by direct command commanded him to kill the deceased. 2d. Said charge does not instruct the jury the correct test of defendant's responsibility in the case under the evidence before them.

8th. The court erred in using the following language: "If you find from the evidence, beyond a reasonable doubt that the defendant killed Vina Coleman as charged in this indictment, and you further find that his brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience, and judgment, and the defendant in committing the act
62 acted from an irresistible and uncontrollable impulse, or, if you have a reasonable doubt in regard thereto, then he would be guiltless and would be entitled to be acquitted." Error because the word brain is used instead of mind and makes the defendant's right to

he acquitted depend on an insane brain instead of a condition of the mind at the time of the killing. The jury, under said charge, acquit defendant unless they believed he acted under an irresistible and uncontrollable impulse in taking the life of Vina Coleman. 3rd, the charge does not submit the defense relied upon the defendant, viz, delusive insanity.

9th. The court erred in attempting to give the law in using the following language, viz: "The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased brain, and it was not partially diseased or to some extent, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were so impaired that the act done was an irresitible and uncontrollable impulse with him at the time committed the act. If his brain was not this condition he can be punished by law. This charge is error 1st because makes the defendant's responsibility to the law for the act of killing Vina Coleman depend solely upon whether or not his brain was impelled by an irresistible and uncontrollable impulse, when his responsibility depended solely upon the condition of his mind, and the question of irresistible impulse was not even raised by the proof offered. 2nd, said charge excluded the real defense, delusive insanity, and makes defendant's guilt depend on whether or not he was laboring under the influence of impulsive insanity at the time he killed
63 the deceased. 3rd, said charge is inconsistent with the law; not applicable to the facts in evidence; places the burden on the defendant of showing that he did not have the mental capacity to form a criminal intent, but must show, in addition to such want of capacity, that the disease had so taken charge of his brain and had impelled it. The jury should have been instructed to inquire as to the condition of the defendant's mind at the time of the killing—not his brain.

10th. The court erred in the following, viz: The Government has introduced some evidence in regard to the defendant drinking whiskey about the time the homicide is said to have been committed, and contends that the defendant was not insane, but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land, and had stated to a witness "that he desired him to tell the truth in regard to the matter," and from this evidence insists that Hotema was not insane, but was aware of the act he was committing, and also aware of the fact that it was wrong. Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred in determining the question of whether or not Hotema was insane at the time the homicide was committed or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. Error because no witness had testified to such declarations from the defendant. 2nd, because it called the attention of the jury to criminating evidence, and instructed them to consider it against the. 3rd, said charge is erroneous

because it that the Government insists from this particular evi-
64 dence that the defendant was not insane, but drinking, when in fact the prosecution had not offered such evidence for any purpose.

11th. The court erred in its charge in using the following language: "There is evidence in this case tending to show that Hotema believed in witches and that that was taught by the Bible, and had the belief that his people and tribe was being affected by witches and that the deaths that occurred in the neighborhood were due to the evil influence of the witches, and that the party that he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant, Hotema, believed in witches and that it was the result of his investigation and belief as to what the Scriptures taught, and that he, upon that belief, thinking he had the right to kill the party he is charged with killing because he thought she was a witch, but at the time he knew it was a violation of human laws and he would be punished, therefore in that event it would not be an insane delusion on the part of Hotema, but would be an erroneous conclusion, and being so would not excuse him from the consequences of his acts; and also, if you further believe he came to the conclusions, from his investigation and understanding of the Scriptures, that this was a witch, and also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both these causes were the sole inducements that caused him to do the act, he would not be guiltless and would be responsible therefor." Error 1st. Because the evidence did not warrant such charge. The undisputed evidence shows that Hotema had for many years taught and preached against the ideas and doctrines of witchcraft and had taught his people that there was no such things as witches. Said charge makes the defendant's right to an acquittal under his special plea depend upon what caused his insan-
65 ity, if insane. Said charge states a condition of the defendant's mind that would, in fact, show insane delusions, and then tells the jury that if they believe that such condition did in fact exist in the defendant's mind at the time of the killing, that such condition and acts would not be an insane delusion, but an erroneous conclusion. Said charge tells the jury that if the defendant's condition was the result of the use of intoxicating liquors, yet he would be amenable to the law and punishable for his acts. The charge fails to limit the effect to the recent use of intoxicating . The charge fails to define delusive insanity, which should have been done, and leaves the jury to say whether the facts established the claim of the defendant that he was laboring under delusive insanity at the time of the killing.

12th. The court erred in using the following language in his charge: "Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by the teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and that at the time of such killing he performed the same solely on such belief, and he was not laboring under an insane delusion. If you believe this state of case existed, you will find the defendant guilty as in the indictment." Error, because it wholly fails to define insane delusions and distinguish between sane and insane delusions. Said charge states a case of undoubted insane delusions, and then tells the jury if they believe such

case did exist in Hotema's case they should convict him. This charge deprives the jury of the right to determine from all the evidence before them whether the defendant was sane or insane at the time of the homicide.

13th. The court erred in instructing the jury as to the form of their verdict in the event they found the defendant guilty.

66 14th. The court erred in refusing the special charges asked by the defendant as follows: "If, from all the evidence before you in this case, you believe that the defendant, Solomon Hotema, at the time he shot and killed Vina Coleman, was laboring under such mental condition he did not have sufficient mental to and did not know it was wrong to kill said Vina as he did kill her, and you further believe this condition of defendant's mind was not produced by the recent use of intoxicating liquors, then he is entitled to be acquitted."

2nd. If you believe from the evidence before you that at the time of the killing of Vina Coleman by the defendant, defendant was in such mental condition that he honestly believed that God had by direct command commanded him to kill the said Vina, and that at the time he did the killing he believed he was doing God's will, then he is entitled to be acquitted upon his plea of delusive insanity. In this connection you are instructed that if defendant's mind was as above stated, and he honestly as stated, then it is immaterial what caused such mental condition providing it was not the recent use of intoxicating liquors. These charges should have been given because the evidence offered demanded such instructions, and because the court's charge restricted the jury and required them to find upon a state of case which the law does not demand a conviction. The court erred in overruling defendant's motion for a new trial, and entering final judgment and sentence because said motion set up good and lawful grounds for a new trial. Wherefore defendant prays that on a hearing said cause be reversed and remanded.

J. C. HODGES, *Atty. for Deft.*

(Endorsed:) No. 2027. The United States vs. Solomon Hotema. Assignments of errors. Filed Jan'y 27, 1902. J. B. Dailey, clerk.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States to M. C. McLemore, attorney of the United States for the eastern district of Texas, greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Texas, at Paris, wherein Solomon Hotema is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the honorable David E. Bryant, judge of the district court of

the United States for the eastern district of Texas, and the seal of said court, at Jefferson, this 27th day of January, A. D. 1902.

[SEAL.] D. E. BRYANT, *Judge.*

Attest:

J. B. DAILEY, *Clerk.*

(Endorsed:) Came to hand February 10th, 1902. Executed same on February 10th, 1902, by delivering a certified copy of this writ to M. C. McLemore in person at Galveston, Texas. John Grant, marshal, by H. H. Haley, deputy. No. 2027. The United States vs. Solomon Hotema. Citation. Filed Feby. 12th, 1902. J. B. Dailey, clerk.

68 In the district court of the United States for the eastern district of Texas, at Paris.

I, John B. Dailey, clerk of the district court of the United States for the eastern district of Texas, at Paris, hereby certify that the foregoing is a true, full, and correct record of cause number 2027 on the criminal docket of said court, entitled The United States vs. Solomon Hotema, as the same now appears of record and on file in my office at Paris.

Witness my official signature and the seal of said court, at my office in Paris, Texas, this the 19th day of February, A. D. 1902.

[SEAL.] JOHN B. DAILEY, *Clerk.*

69 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Texas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States, plaintiff, and Solomon Hotema, defendant, a manifest error hath happened, to the great damage of the said Solomon Hotema, defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas, the 27 day of January, in the year of our Lord one thousand nine hundred and two.

[SEAL.] JOHN B. DAILEY,
Clerk of the District Court of the United States for the Eastern District of Texas, at Paris.

Allowed January 27th, 1902, by D. E. Bryant, judge presiding at said trial.

70 I, John B. Dailey, clerk of the district court of the United States for the eastern district of Texas, at Paris, hereby certify that I received this writ on the 27th day of January, 1902, and that on this 20th day of February, 1902, I have transmitted to the clerk of the United States Supreme Court, at Washington, D. C., through U. S. mail, a true copy of the record and proceedings in the within-named cause, duly certified under my hand and seal.

Witness my hand and the seal of said court at my office in the city of Paris the day and date last above named.

[SEAL.] JOHN B. DAILEY, *Clerk.*

By *Deputy.*

(Indorsed:) No. 2027. Criminal docket. United States district court, eastern district of Texas, at Paris. The United States vs. Solomon Hotema. Writ of error. Filed January 27, 1902. J. B. Dailey, clerk, by deputy.

(Indorsement on cover:) File No. 18425. E. Texas D. C. U. S. Term No. 572. Solomon Hotema, plaintiff in error, vs. The United States. Filed February 26, 1902.

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No. 572.

Motion to advance

Filed Mar. 19, 1902.

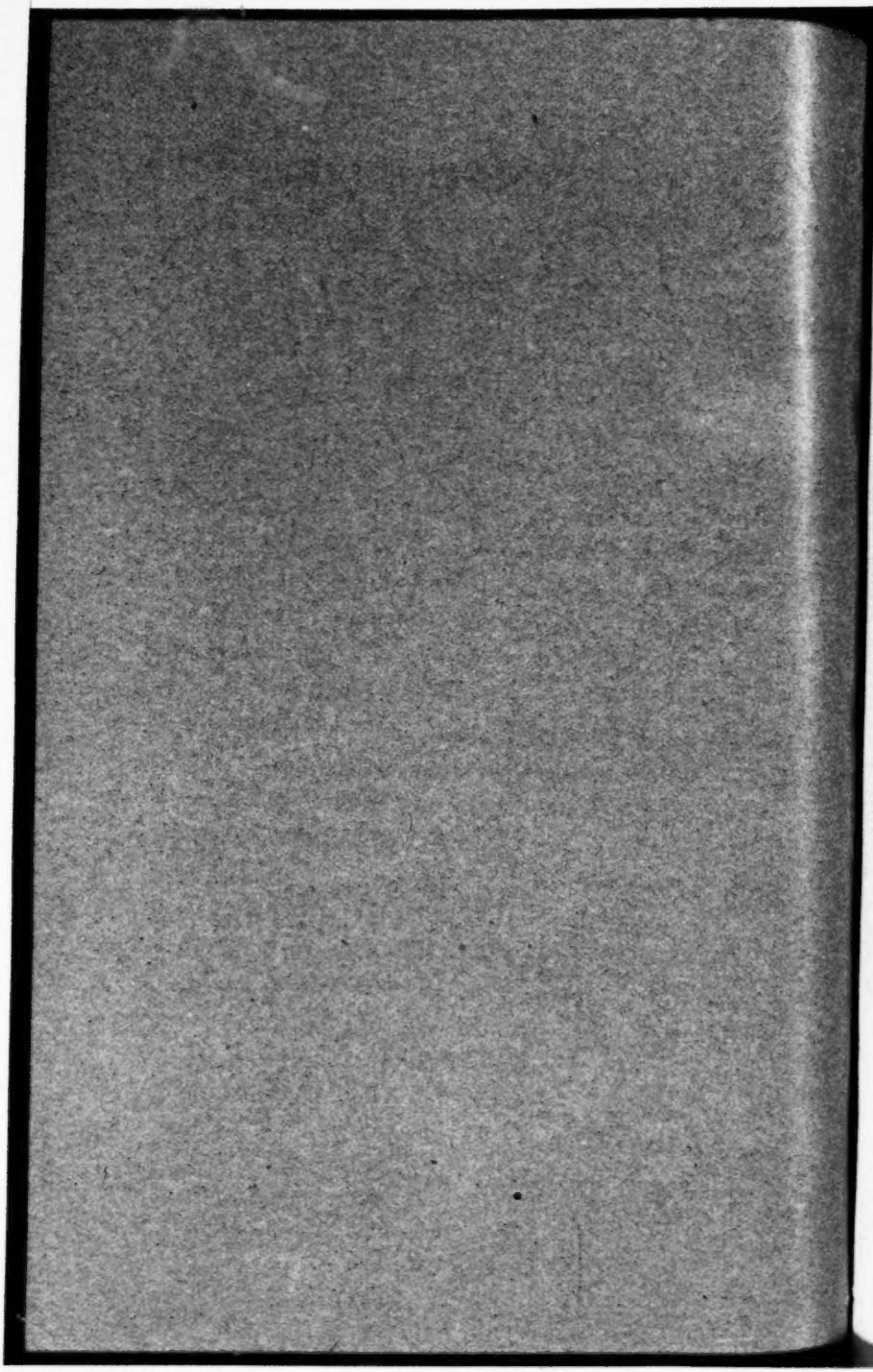
Office Supreme Court U.S.
FILED
MAR 19 1902
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901

SOLOMON HOTEMA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 572.

MOTION TO ADVANCE.



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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SOLOMON HOTEMA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 572.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the United States court for the Indian Territory, central district, on April 4, 1900. On April 9, 1900, he filed an affidavit and application for change of venue, on the ground that he is a member of the Choctaw tribe of Indians, and the United States court at Paris, Tex., is the nearest and most convenient place of holding court to that where the offense is alleged to have been committed, which application was granted. He was tried, and on November 26, 1901, found guilty and sentenced to be hanged.

In accordance with section 6 of the act of January 25, 1899 (25 Stats., 656), the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served upon opposing counsel.

J. K. RICHARDS,
Solicitor-General.

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No. 572.
Br. of Hodges for P. G.
Filed May 12, 1902.

FILED
MAY 12 1902
JAMES H. MCKENNEY,
Clerk.

Supreme Court
OF THE
United States
OF AMERICA.

OCTOBER TERM, 1901.

Term No. 572.

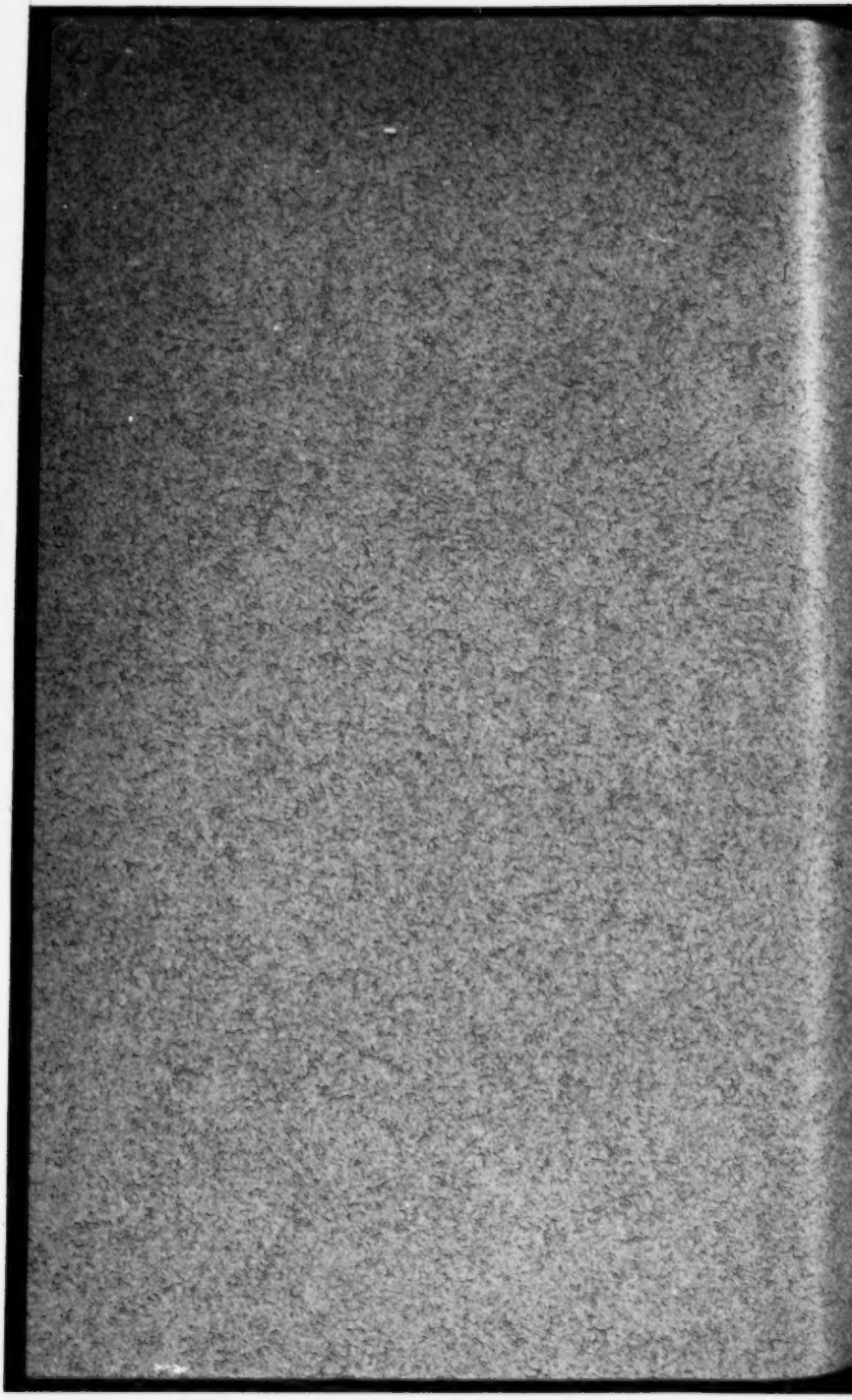
Solomon Hotema, Plaintiff In Error,

VS.

The United States.

BRIEF OF

JACOB C. HODGES.
Attorney for Plaintiff in Error.



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Supreme Court

OF THE

United States

OF AMERICA.

OCTOBER TERM, 1901.

Term No. 572.

Solomon Hotema, Plaintiff In Error,

VS.

The United States.

In error to the District court of the United States for the Eastern District of Texas.

Statement of Case:

The Grand Jury for the Central District United States court for the Indian Territory holding session at Antlers, I. T., on April 4th, 1900, returned in the

said court the indictment in this case charging plaintiff in error with the murder of Vina Coleman. On motion of the plaintiff in error the venue was changed to the United States District, Eastern District, at Paris, Texas.

At a regular term of said court at Paris, Texas, on the 20th day of November, 1901, the government announced ready for trial, plaintiff in error presented special plea as shown in his assignment of errors herein after stated, said plea was overruled and plaintiff forced to trial on the general issue, whereupon plaintiff in error by his counsel, said not guilty, and stated while he did not deny the killing, he, plaintiff was insane at the time of the homicide, and therefore not amenable to the law for the offence of murder charged in the indictment.

After all the evidence had been offered counsel for plaintiff in error, moved the court to allow plaintiff in error to open and conclude the argument as shown by the Bill of exceptions, page 116 record, which was overruled, and counsel for the government allowed to open and conclude the argument to which plaintiff in error resumed exceptions, record page 16.

Plaintiff in error excepted to the charge of the court as shown in bill of exceptions record pages 16 to 20 inclusive. Verdict of guilty of murder fixing the death penalty was returned. Motion for new trial

overruled, plaintiff in error perfected this appeal. and now prays this court to reverse and remand the case for errors assigned and shown in the records as follows:

1st. Assignment.

"The court erred in sustaining the demurer to defendants plea of former jeopardy; said plea if true was a bar to the prossecution; the plea alleged that defendant had been tried before a jury in the United States court at Paris, Texas, upon the same issue joined in this case. Hence error to sustain a demurer." The assignment is a proposition its self. The plea was sufficient to allow plaintiff in error to have a finding by the jury upon the facts alleged in the plea.

AUTHORITIES:

Ball vs. United States 158. 163

U. S. Supreme court report and authorities there cited.

2nd. Assignment.

"The court erred in refusing to allow Dr. Moody and others to give their opinions as to what produced the mental condition of the defendant at the time of the homicide i. e. that his deranged and insane condition was in the opinion caused from physical condition and not from reading the Bible or traditional teachings and heredity. Proposition: when any issue is fairly raised on the trial of a case evidence should

always be admitted to prove or disprove the issue. the court in its charge made the causes that produced the deranged and insane condition of the defendant an issue and made his guilt or innocence depend upon the causes which produced the insanity. see courts charge 12 paragraph record page 34.

3rd Assignment.

"The court erred in refusing the defendant's counsel the right to open and conclude the argument. The defendant in his plea admitted the killing of the alleged deceased at the time and place charged in the indictment, and assumes the burden of showing that he was insane at the time of the killing. The sanity of the defendant at the time of the killing was the only issue for the jury to pass on, and the only one submitted to them in the court's charge, hence error to refuse the defendant the right to open and conclude the argument of the case.

Our contention is that the record page 15 shows that plaintiff in error before any evidence was offered admited as a part of his plea that he did the killing at the time and place alleged in the indictment and as a defense assumed the burden of showing that at the time of the homicide he was insane The government did not offer any evidence to prove or disprove the issuejoined until the plaintif in error had offered all of his evidence to prove the truth of his affirma-

tive plea, insanity; therefore counsel should have been allowed to open and conclude the argument. And the action of the court in denying this right to plaintiff in error was certainly prejudicial to plaintiffs in error.

4th. Assignment.

The court erred in using the following language: "The most usual illustration and the ones best understood generally of the term 'express malice' are such as lying in wait for the intended victim, and when he appears he is slain, or preparation and administering poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be a killing upon express malice." Error because there was no evidence before the court as to lying in wait, or preparing or administering poison. Said charge is not correct definition of express malice. This assignment presents the question upon the theory that all charges should be applicable to the facts in evidence.

5th Assignment.

The court erred in using the following language in his charge: "In this case it is immaterial so far as the question of guilt or innocence that the evidence fails to show any motive for the killing. Error because want of motive for the killing was material, and the jury should have considered the fact that the evi-

dence wholly failed to show any motive on the part of the defendant for the killing. Defendant's bill of exceptions shows undisputed that the defendant was a relative and warm friend of the deceased for many years up to and including the time of the killing; these facts should have been considered by the jury. The want of motive was a material inquiry for the jury to consider in determining whether defendant acted from an insane delusion in killing deceased or from some motive which might constitute his act a crime. Hence error to tell the jury that the admitted fact of want of motive was immaterial in passing on the guilt or innocence of the defendant. This assignment is a proposition itself. Bill of exceptions, record page 16 shows the truth of the facts stated in said assignment. Our contention is that while it is not error for the trial court to comment upon the testimony in a case on trial, give his views as to the weight of the evidence and may go so far as to comment on the credibility of witnesses; but when the court assumes the right to tell the jury that admitted facts establishing or tending to establish the truth of any issne joined, are immaterial, goes beyond the bounds that the law permits and commits error for which we submit any case ought to be reversed.

6th Assignment.

The court erred in using the following language

in his charge: "The jury does not assess the punishment in this court; they only find whether the defendant is guilty or not guilty, and a party convicted of murder is punishable by death unless the jury adds to their verdict without capital punishment, in which event the party is imprisoned for life. Error because not the law, but just the converse, the statutes of the United States make it the duty of the jury in every capital case to fix the punishment by their verdict. Said charge is inconsistent with itself and other parts of the court's charge, and well calculated to cause the jury to conclude that the court finally fixed the punishment after conviction."

7th. Assignment.

The court erred in using the following language in its charge: "If it is true that the defendant took the life of Vina Coleman as charged in the indictment, and at the time said act was committed the mental and physical faculties of said defendant were beyond his control, or if some controlling mental or physical disease was in truth the acting power within him which he could not resist, and he was impelled, without reason or purpose, he would not be accountable to the law. Error because the defendant had not plead impulsive insanity as a defense; defendant did not claim that at the time of said killing that he was controlled by such an uncontrollable impulse that he

could not control his physical actions. The only defense relied upon by defendant was delusive insanity—that laboring under such insane delusion he acted deliberately in taking the life of Vina Coleman under the delusive and insane belief that God had by direct command commanded him to kill the deceased. 2nd. Said charge does not instruct the jury the correct test of defendant's responsibility in the case under the evidence before them." Our contention is that the charge complained of in assignment 7th presented for the consideration of the jury a defense not relied upon by the plaintiff in error and calls their attention to a condition of the defendant mentally and physically not claimed by council for plaintiff in error. Said charge called the attention from the real issue and makes the right of the plaintiff in error to an acquittal depend upon whether or not defendant had control of his physical as well as his mental faculties at the time of the killing.

We contend that the plaintiff may as a matter of fact have had complete control of his physical faculties at the time of the homicide and may have acted with a character of deliberate purpose; yet if such deliberation and purpose was the result of a diseased mind then plaintiff in error would be entitled to an acquital. 8th. Assignment.

The court erred in using the following lang-

uage: "If you find from the evidence, beyond a reasonable doubt that the defendant killed Vina Coleman as charged in this indictment, and you further find that his brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience and judgment, and the defendant in committing the act acted from an irresist ible and uncontrollable impulse, or, if you have a reasonable doubt in regard thereto, then he would be guiltless and would be entitled to be acquitted." Error because the word brain is used instead of mind and makes the defendant's right to be acquitted depend upon an insane brain instead of a condition of the mind at the time of the killing. The jury, under said charge, acquit defendant unless they believed he acted under an irresistible and uncontrollable impulse in taking the life of Vina Coleman. 3rd, the charge does not submit the defense relied upon by the defend ant, viz, delusive insanity.

Assignment 8th is a clear, concise presentation of one of the questions involved. To-wit: Did the right of the plaintiff in error to an acquittal under his plea depend upon whether or not he acted from an irresistible and uncontrollable impulse in killing the deceased Vina Coleman. We insist that the charge is misleading and not the law of the case. If plaintiff in error was in fact insane at the time of the homicide, that

is, if his mental condition was such that he did not know right from wrong as applied to the act he was doing, then we submit as a legal proposition he was entitled to an acquittal. no matter what his physical condition may have been. And plaintiff in error may have acted deliberately in the killing, yet if he was in fact laboring under delusive insanity he had the right to a clear charge on that issue and an acquittal.

9th. Assignment.

The court erred in attempting to give the law in using the following language, viz.: "The real test, as I understand it, of liability or non-liability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased brain. and it was not partially diseased or to some extent, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were so impaired that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was not in this condition he can be punished by law " This charge is error, 1st, because it makes the defendant's responsibility to the law for the act of killing Vina Coleman depend solely upon whether or not his brain was impelled by an irresistible and un-

controllable impulse, when his responsibility depended solely upon the condition of his mind, and the question of irresistible impulse was not even raised by the proof offered. 2nd, said charge excluded the real defense, delusive insanity, and makes defendant's guilt depend on whether or not he was laboring under the influence of impulsive insanity at the time he killed the deceased. 3rd, said charge is inconsistent with the law; not applicable to the facts in evidence; places the burden on the defendant of showing that he did not have the mental capacity to form a criminal intent, but must show, in addition to want of capacity, that the disease had so taken charge of his brain and had impelled it. The jury should have been instructed to inquire as to the condition of the defendant's mind at the time of the killing—not his brain.

The charge complained of in this assignment tells the jury in effect that it is their duty to convict plaintiff in error, unless at the time he killed Vina Coleman he was acting under an irresistible and uncontrollable impulse see charge of the court record page 27. We submit that no real expert has ever yet determined as a matter of fact that the brain is the seat of the mind or that the mind is the product of the brain. Hence all that part of the charge about condition of the brain is error.

9th Assignment.

"The court erred in the following, viz: The government had introduced some evidence in regard to the defendant's drinking whisky about the time the homicide is said to have been committed, and contends that the defendant was not insane, but drinking, and has introduced some evidence to the effect that Hotema was aware of the fact that he was violating the law of the land, and had stated to a witness, 'that he desired him to tell the truth in regard to the matter,' and from this evidence insists that Hotema was not insane, but was aware of the act he was committing, and also aware of the fact that it was wrong. Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piece-meal, but all evidence introduced in this case on both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. Error because no witness had testified to such declarations from the defendant. 2d, because it called the attention of the jury to criminating evidence, and instructed them to consider it against the defendant. 3d, said charge is erroneous because the government insists from this partic-

ular evidence that the defendant was not insane, but drinking, when in fact the prosecution had not offered such evidence for any purpose."

Statement from the record, bill of exceptions, page 18. "The defendant excepted to language as shown by assignment No. 9. Third, because it called the jury's attention to criminating evidence and instructed them to consider said evidence in determining whether or not defendant was insane, which evidence was never offered; no witness had used the language used, or substance of the language the court used in his charge."

Proposition under Assignment No. 9.

No court was ever vested with the right to call the attention of the jury to facts not in evidence. This proposition needs no authority to support its correctness; it is fundamental. The court in all cases demanding a charge to a jury must apply the law to the evidence offered on the trial; this may be done before or after the evidence is offered. We now, as an argument on this vital question, submit to the highest court in the nation, a record showing that the trial court approved a bill of exceptions which states the truth, in which it is shown that after the court had charged the jury, and before they retired to consider of their verdict, counsel for plaintiff excepted to the court's charge, because the court had called the attention of the jury to criminating

evidence, when in fact no such evidence had been offered, nor the substance thereof. An admission on the part of the trial judge that he did call the attention of the jury to evidence not offered, and instructed them to consider it against the plaintiff in error, using this language in regard to the evidence which was never before the jury: "And from this evidence insists that Hotema was not insane, but was aware of the act he was committing and also aware of the fact it was wrong." (See record, page 18). Thus telling the jury to consider evidence which was never offered, nor the substance thereof. Just here we desire to call attention to the attempt by the court to cure this patent error which he had committed by qualifying plaintiff's in error bill of exceptions as follows: (Record page 24).

5th As to the 9th paragraph of defendant's bill, Bond Coleman, a witness for the government, testified that immediately after had killed Vina Coleman, the defendant said to persons then present: "I now summon you all as witnesses." Riley Wilson, a government witness, testified that the defendant stated to him at Grant late that afternoon that he was going to Paris that night, a distance of about twenty miles, and then return and go to Antlers and surrender to the authorities, and the court at page 8 of its charge told the jury that they would be 'governed absolutely and entirely upon all questions of law by the charge

40804

I have given you, but upon the questions of fact and their application to principles I have given you in charge that is entirely within your own control."

We submit that this explanation does not correct the evil in the error committed. The evidence as recited by the court, as to witness Coleman, was in no sense that used by the court. Coleman's testimony, that the language used by the plaintiff in error was that of an insane mind. A man kill his friend and relative and then turn to those around and say, "I now summon you all as witnesses." It would have been going quite far enough if the trial court had called the jury's attention to the evidence upon which he seeks to justify his charge. But to admit he did call the attention of the jury to evidence not offered, and then when his attention was called to his error, refuse to correct it because other witnesses had testified to other facts going to show that plaintiff in error was not insane, is worse than a subterfuge, and error for which this case, in our humble opinion, *should* be reversed.

10th Assignment.

The court erred in its charge in using the following language: "There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe was being affected by witches, and that the deaths that oc-

curred in the neighborhood were due to the evil influence of the witches, and that the party that he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant, Hotema, believed in witches, and that it was the result of his investigation and belief as to what the scriptures taught, and that he, upon that belief, thinking he had the right to kill the party he is charged with killing because he thought she was a witch, but at the time he knew it was a violation of human laws and he would be punished; therefore, in that event, it would not be an insane delusion on the part of Hotema, but would be an erroneous conclusion, and being so would not excuse him from the consequences of his acts; and also, if you further believe he came to the conclusions from his investigation and understanding of the scriptures that this was a witch, and also used spirituous liquors, and these two combined were the cause or causes that lead him to the commission of the act, and that either or both these causes were, or these two combined were the cause or causes that lead him to the commission of the act, and that either or both these causes were the sole inducements that caused him to do the act, he would not be guiltless and would be responsible therefor." Error 1st. Because the evidence did not warrant such charge. The undisputed evidence shows that Hotema had for many years taught and preached against the

doctrines of witchcraft and had taught his people that there were no such things as witches. Said charge makes the defendant's right to an acquittal under his special plea depend upon what caused his insanity, if insane. Said charge states a condition of the defendant's mind that would, in fact show insane delusions, and then tells the jury that if they believe that such condition did in fact exist in the defendant's mind at the time of the killing, that such condition and acts would not be an insane delusion, but an erroneous conclusion. Said charge tells the jury that if the defendant's condition was the result of the use of intoxicating liquors, yet he would be amenable to the law and punishable for his acts. The charge fails to limit the effect to the recent use of intoxicating liquors. The charge fails to define delusive insanity, which should have been done, and leaves the jury to say whether the facts established the claim of the defendant that he was laboring under delusive insanity at the time of the killing.

Proposition under 10th Assignment.

Delusive insanity is a defense to homicide in all cases where the evidence shows that there is a reasonable doubt as to the condition of the person's mind at the time of the homicide. Where delusive insanity is plead as a defense, the test of responsibility is just as in any other character of insanity, viz: Did the prisoner at the time of the doing the

unlawful act know that he was doing wrong or committing a crime. Judge Cox, in the Guitteau case, used this terse and clear language in his charge to the jury: "But that the only safe rule for you is to direct your reflections to the one question which is the test of criminal resposibiiity, and which has been so often repeated to you, viz: Whether, whatever may have been the prisoner's singularities and eccentricities he possessed, the mental capacity at the time the act was committed, to know that it was wrong or was deprived of that capacity by mental disease." 10th Federal Reporter, page 183. In this clear test of criminal responsibility we see nothing of physical capacity or disease of the brain, nor irresponsible and uncontrolable impulse.

We submit that if criminal responsibility for crime depends upon what caused the prisoner to become insane, or deprived him of the mental capacity to determine right from wrong as applied to the act he is about to do. Then, indeed, we had better admonish our people to be careful what they read and how they investigate great questions lest they might become insane from causes that would not save an insane man from the gallows, although the trial court and jury were satisfied that the prisoner was insane when he committed the deed. The very thought that a man's responsibility for crime, if insane, depends upon the causes that produced his mental condition, when not traceable to his own wrongs

such as the recent use of intoxicating liquors is illogical and can not be maintained on correct principles of our advanced jurisprudence.

11th Assignment.

The court erred in using the following language in his charge. "Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by the teachings of the Bible he had the right to kill the party he did kill because he thought she was a witch, and that at the time of the killing he performed the same solely on such belief, and he was not laboring under an insane delusion. If you believe this state of case existed, you will find the defendant guilty as in the indictment." Error, because it wholly fails to define insane delusions and distinguish between sane and insane delusions. Said charge states a case of undoubted insane delusions, and then tells the jury if they believe such case did exist in Hotema's case they could convict him. This charge deprives the jury of the right to determine from all the evidence before them whether the defendant was sane or insane at the time of the homicide.

This assignment will be considered with 12th assignment.

12th. The court erred in refusing the special charges asked by the defendant as follows: "If, from all the evidence before you in this case, you believe that the defendant, Solomon Hotema, at the time he shot and killed Vina

Coleman, was laboring under such mental condition he did not have sufficient mental capacity to, and did not know it was wrong to kill said Vina Coleman as he did kill her, and you further believe this condition of defendant's mind was not produced by the recent use of intoxicating liquors, then he is entitled to be acquitted."

2d. "If you believe from the evidence before you that at the time of the killing Vina Coleman by the defendant, defendant was in such mental condition that he honestly believed that God had, by direct command, commanded him to kill the said Vina, and that at the time he did the killing he believed he was doing God's will, then he is entitled to be acquitted upon his plea of delusive insanity. In this connection you are instructed that if defendant's mind was as above stated, and he honestly believed as stated, then it is immaterial what caused such mental condition, providing it was not the recent use of intoxicating liquors." These charges should have been given because the evidence offered demanded such instructions, and because the court's charge restricted the jury and required them to find upon a state of case which the law does not demand a conviction.

Proposition under 12th Assignment.

No person can commit the crime of murder when in such mental condition as not to have mental capacity to know it is wrong to kill another without any cause. Hence,

the first paragraph of the special instructions should have been given.

The court tried by explanation and qualification of plaintiff's in error bill of exceptions, to correct the error in refusing special charges asked by plaintiff in error, explanation as follows:

"As to the thirteenth paragraph of defendant's bill, the charge therein referred to is believed to have been fully covered by the general charge of the court. There was no evidence in this case to show that the defendant acted under a direct command of God, and the court, at page six of its charge, charged the jury upon the question of insane delusions, as well as upon page five thereof and elsewhere." (Record page 24).

Under this assignment we beg to call the attention of the court to matters *not printed* in record. The attorney general ordered or requested the district attorney to forward to the department of justice a copy of the evidence in the case. If I may be permitted to call attention to that record then I submit that it shows that defendant did believe that God had commanded him to kill Vina Coleman and others, and he so declared at the time of the killing and for months after his incarceration. Besides, there is much evidence in said record to show that plaintiff in error did believe that God had commanded him to kill Vina Coleman and others.

In fact, the defense was placed solely upon the idea that plaintiff in error believed that he owed the duty to God to kill Vina Coleman and others, and impressed with that belief he did kill three on the same day, at different times and places. We rely upon such assignment of error and pray for a reversal.

We have not referred to any authorities, because of the physical condition of the writer, who has not had access to authorities, having prepared this brief at his residence. In conclusion, we insist that many of the errors complained of are fundamental. Wherefore plaintiff in error prays a reversal.

Respectfully submitted,

JACOB C. HODGES,

Attorney for Plaintiff in Error.

4080

No. 572.

Brf. of Atty. Gen.

Office Supreme Court
FILED
APR 28 1902
JAMES H. McKENNEY,
Clerk.

Filed April 28, 1902.

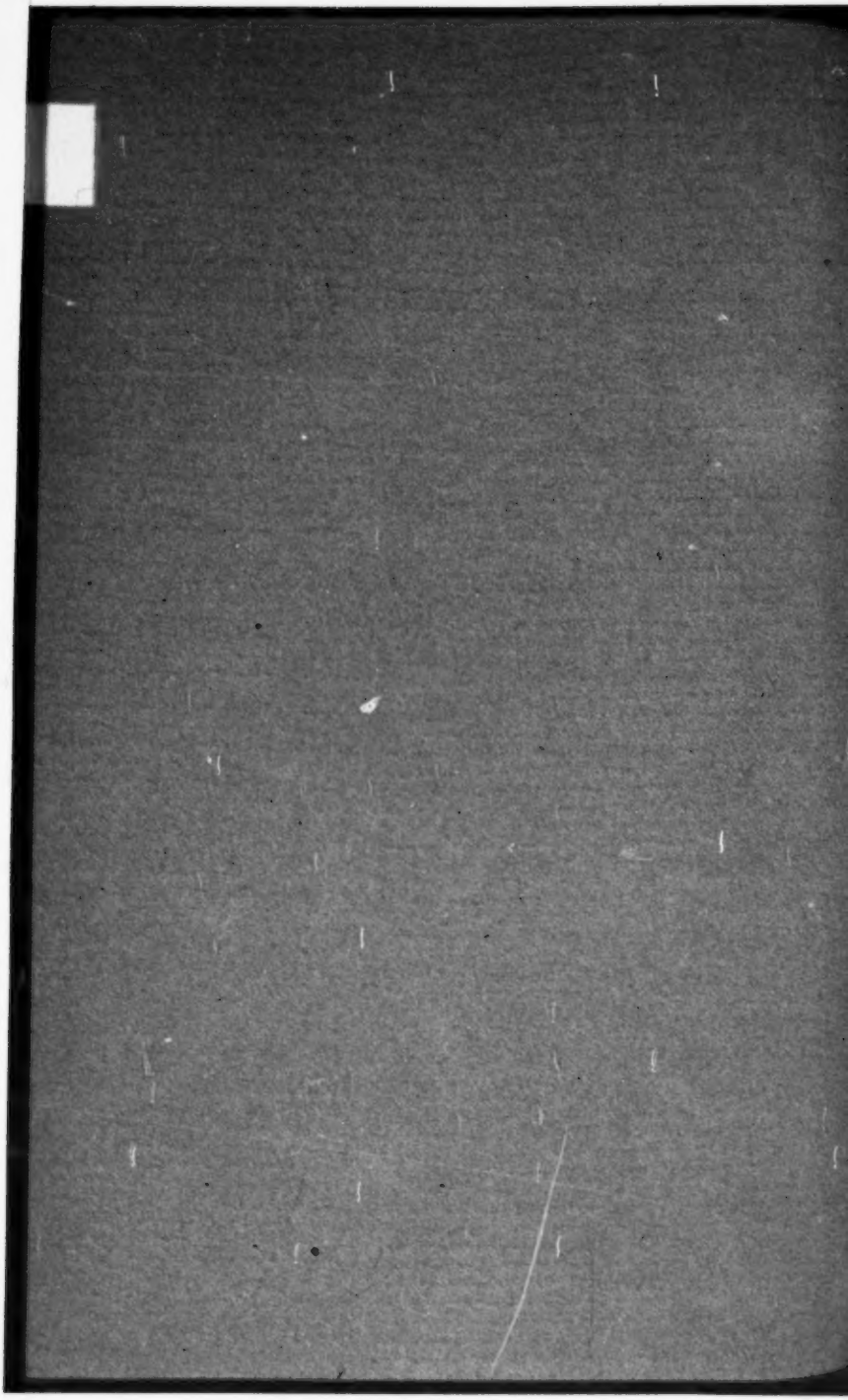
In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SOLOMON HOTEMA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 572.

ARGUMENT FOR APPELLEE.

JAMES M. BECK,
Assistant Attorney-General.



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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

SOLOMON HOTEMA, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 572.

ARGUMENT FOR APPELLEE.

The appellant, Solomon Hotema, was convicted of the murder of one Vina Coleman in the Indian Territory, and was duly sentenced to be hung. The fact of the murder was not disputed, and was exceptionally atrocious in character, assuming that the defendant was mentally responsible for his acts. Hotema was a Choctaw Indian, about 50 years of age. He had become a leader of his people, and had been a school teacher, a minister of the gospel, a lawyer, and a judge. The testimony showed that he was ordinarily of a peaceable temperament, and was generally respected, but for several years previous to the murder he occasionally drank to excess, and during these periods of intoxication he was apt to become offensively demonstrative in his conduct. The testimony further showed that Hotema seemed to share some belief in the existence of witches. On the day before

the murder Hotema attended a session of the local Presbyterian Church and that evening sent to the neighboring town of Grant for several quarts of whisky. Early on the following morning, namely, April 14, 1899, Hotema went to the house of Vina Coleman, who was a connection of his by marriage, and went up to her and raised his gun and fired three shots at her, the last of which was fatal. He then returned to his home, and several hours later he was seen in company with two other Choctaw Indians. They rode to the house of one Amos Morris, who was several miles distant, and killed him, and later in the day he killed another Indian woman. There was some proof that he had been drinking to excess on the day before the three murders. The defendant did not dispute the fact of the killing, but made a defense on the ground of delusional insanity, contending that Hotema at the time of the commission of the murders was laboring under the insane delusion that the people whom he murdered were witches. Upon this point the testimony was conflicting. Expert and nonexpert witnesses testified for and against the theory of insanity, and the jury by its verdict of guilty found that he was sane.

He was indicted in the court of the Indian Territory, but the case was removed to the United States district court for the eastern district of Texas, where the trial was had and the conviction sustained.

With this brief sta'ement of facts I pass to such of the assignments of error as seem to justify discussion.

(1) The first assignment of error is because of the

court in sustaining the demurrer of the United States to the defendant's plea of former jeopardy.

The defendant was tried on an indictment which charged "that one Solomon Hotema, on the 14th day of April, A. D. 1899, within the central district of the Indian Territory aforesaid, with force and arms, in and upon the body of one Vina Coleman then and there being, feloniously, willfully, and of his malice aforethought did make an assault," etc.

To this indictment he pleaded "not guilty," and also filed a special plea, which is as follows:

> Now comes the defendant, Solomon Hotema, and for special plea herein says, on oath, that there were three indictments filed in this court charging him with the crime of murder of different persons; that two of the cases, viz, Nos. 2024 and 2025, were consolidated and tried in this court, and on the —— day of April, 1901, the jury returned a verdict of not guilty, which was received by the court, and the jury discharged. Affiant further shows that the only defense he or his counsel offered on the trial of said case was a plea of insanity. Defendant, on the trial of said case, admitted the killing charged in all three of said indictments, and as a defense affirmed that at the time of the killing he was suffering from such a diseased condition of the brain as that he did not have the mental capacity to commit murder. The only issue made in the case was whether affiant was sane or insane at the time he killed the three persons. The jury found the defendant not guilty on said issue. Affiant alleges further that each and

every fact that he now remembers of that would be admissible on the trial of this cause was offered on the trial aforesaid—at least, proof was offered on every issue that can arise in this case; that the witnesses who testified in the other cases are witnesses in this case, and will swear to same as in the case tried; that these three persons are charged to have been killed on the same day; that on said trial every circumstance connected with the killing charged in this case was proved on the other trial. Affiant says, by reason of the facts herein stated, he has been once in jeopardy upon the same identical case and issue now to be tried; that a jury in this case under affiant's plea of insanity will be compelled to make their verdict upon the same evidence and the same issue the jury found the defendant not guilty on in cases Nos. 2024 and 2025, tried in this court and verdict rendered on —— day of April, 1901. Wherefore defendant pleads former jeopardy, and says this court can not again arraign and try defendant upon said issue without depriving defendant of his constitutional rights.

To this plea the United States attorney demurred, and the court sustained the demurrer.

It is difficult to see how the court could have taken any other action, for the plea itself affirmatively suggested the fact that the two preceding indictments, upon which he had been found not guilty, and which were now pleaded in bar of the third indictment, were for the murder of different persons than that charged in the pending indictment. In other words, the defendant, who was indicted for the murder of C,

pleaded that he had already been acquitted of the murder of A and B on the same day. The plea thus showed that the acquittal of which he plead former jeopardy was for different offenses than that which was the subject of the indictment, and it was, therefore, bad.

The constitutional provision relating to former jeopardy only refers to prosecutions for the same offense and for the same identical act and crime. (*United States* v. *Randenbush*, 8 Peters, 288; Bishop on Criminal Law (6 ed., vol. 1, sec. 1049.)

(2) The second assignment of error is not set forth in the bill of exceptions, and, as the record of the trial is not before this court, it is impossible to determine whether the court did refuse to permit the testimony as stated.

(3) The third assignment of error is to the refusal of the court to permit defendant's counsel to open and conclude the argument.

It appears that, after all the evidence was offered, defendant's counsel moved the court to allow him to open and conclude the argument, because the only issue before the jury was the condition of the defendant's mind at the time of the homicide. A reference to the charge, however, will show that the burden of proving every element of the crime, including mental responsibility, was put upon the plaintiff. Thus, the court said:

> I charge you that the burden is upon the Government throughout the entire case to prove every essential element of the case

> charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant, Hotema, was sane at the time of the commission of the act charged, you will acquit him.

The court further charged that if the jury had a reasonable doubt with respect to the mental responsibility of the defendant, he was entitled to an acquittal.

Again, the court said:

> If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whisky he had drunk.

The Government, therefore, having the burden of proving the defendant's sanity beyond a reasonable doubt, was entitled, under the rules of practice, to open and close the case. (*Davis* v. *United States*, 160 U. S., 469, 485.)

At all events, it was a matter clearly in the discretion of the trial judge.

(4) The fourth assignment of error refers to an illustration which the court employed in defining express malice, an illustration which has been used by judges in such cases from time immemorial. It is clear that the court was simply explaining the term "express malice" by an apt illustration, and the criticism that there was no evidence in the case of facts within the illustration is, to say the least, hypercritical.

(5) Counsel for appellant, in his fifth assignment of error, in his professional zeal, inadvertently falls into the error of being unfair to the trial judge. He tears a single sentence from its context and unintentionally perverts its meaning. I quote what the court said, italicising the single sentence which is made the subject of exception, in order that it may be seen how unfair to the trial judge this assignment of error is:

> By the term "implied malice" is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful; that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and, therefore, if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. *Therefore, in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing*, because if the killing was intentional and was not justifiable

> the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts.

As the defendant did not deny that he committed the crime, the question of motive as bearing upon the question of whether he did commit it was wholly unimportant. The court did not mean to suggest, and did not suggest, that the alleged absence of motive was unimportant on the question of mental responsibility. The last sentence of the instruction clearly excludes such a suggestion.

(6) The sixth assignment is a clear case of splitting hairs, and is only justified by the fact that the learned counsel is arguing for the life of a possibly friendless Indian. The court clearly instructed the jury as to their right to add to their verdict of guilty, if they found one, the words "without capital punishment." Indeed, having said so in the portion of the charge which is made the subject of exception, the court repeated the admonition to the jury that they could add the words "without capital punishment" in the last words which he addressed to them. Whether technically the jury "assess" punishment, is wholly unimportant. It is at best a verbal quibble; and whether the jury can be said to "assess" the punishment or not, the defendant suffered no prejudice in this respect. (*Carlon* v. *People of Utah*, 130 U. S. 83; *Fitzpatrick* v. *United States*, 178 U. S., 304.)

(7) The sixth assignment is to certain language of the court in instructing the jury on the subject of mental irresponsibility. The appellant complains that the hypothesis of "impulsive insanity" was submitted to the jury rather than "delusionary insanity." Conceding for the moment that there is any practical distinction between the two, yet it was the duty of the court, in justice to the defendant, to submit every phase of the difficult question of insanity to the jury. Had he limited his instruction to a form of delusionary insanity which is not beyond the control of its victim, he would have done injustice to the defendant. The whole charge fairly shows that in his scrupulous regard for the defendant's rights the court submitted every possible theory of insanity which the evidence could justify, and the charge can not be erroneous because it is too full. Certainly the instruction did the defendant no prejudice.

(8) The eighth assignment of error is again based upon a verbal quibble. The court had submitted to the jury the question whether the "defendant's brain was in a diseased and insane state to such a degree that for the time being it overwhelmed his reason, conscience, and judgment, etc."

It is complained that the word "brain" was used instead of the word "mind." Apart from the fact that the words are popularly used synonymously, as no human knowledge has yet discovered what the mind of man is, except the fact that it exists, and all we know of it is that in some mysterious way it has its central seat

in the physical structure known as the brain, it is obvious that in popular meaning the words "brain" and "mind" can be used interchangeably, and that such use could have done the defendant no harm.

(9) That which has been said with reference to the two preceding assignments of error can be repeated as to the ninth assignment of error, where again the question is made between the "brain" and "mind," and between "impulsive" and "delusionary" insanity.

I simply refer, in this connection, to the court's charge as a whole, which certainly did the defendant no injustice. If it erred, it erred against the Government.

(10) The tenth assignment of error, and the reasons set forth as to its justification, are, I frankly confess, beyond my comprehension.

Whether the court accurately quoted the witness can not be determined in the absence of the testimony, but the suggestion that it is error for the court to call the attention of the jury to criminating evidence is to me incomprehensible.

(11) Similarly obscure are the reasons suggested against the excerpt matter which is set forth in the eleventh assignment of error.

The meaning of the instruction, especially when read in connection with its context, and with the whole opinion, clearly is that if Hotema was sane the mere fact that he had formed an erroneous conclusion as to the existence of witchcraft, or that at the time of the murder such erroneous conclusion was in part induced by excessive drinking, would not excuse him

if "at the time he knew it was a violation of human laws and he would be punished."

(12) In the portion of the charge which is quoted in the twelfth assignment of error the court again expresses the same thought, that if Hotema was "not laboring under an insane delusion," but under an erroneous belief that under the teachings of the Bible he had a right to kill a witch, that in such event he was not insane within the meaning of the law. This is correct, especially in connection with the other portion of the charge stated, as it is based on the assumption which runs through the judge's charge that an erroneous belief will not excuse a man from a criminal act, provided he has sufficient mental capacity to know that he is violating the laws of his country. This, I submit, is a correct exposition of the law. Men can not plead immunity from their criminal acts by reason of their erroneous beliefs, assuming, of course, that they are sane. All sane men have some erroneous beliefs, and all insane men have some correct beliefs. The test of responsibility is not accuracy of observation—else insane asylums would have to be unendingly multiplied—but capacity to reason and act according to that normal standard of thinking which we call rationality. An anarchist may have an erroneous belief, in good faith, that governments are an unjust interference with individual liberty, and that the welfare of man would be promoted by the removal of all rulers, but such erroneous belief will not excuse him if he murders a ruler, provided he had sufficient

mental capacity to know that he was violating the law. Indeed, there are erroneous beliefs so abnormal as to amount to insane delusions that do not necessarily give their victims absolute immunity from punishment. All modern authorities on alienism or on insanity are constantly enlarging their ideas as to the responsibility of the insane. As was said by the House of Lords in McNaughten's case, "Notwithstanding a party commits a wrong act while laboring under the idea that he was redressing a supposed grievance or injury, or under the impression of obtaining some public or private benefit, he is liable to punishment. The jury ought in all such cases to be told that every man should be considered of sane mind until the contrary is proved by the evidence; that before a plea of insanity should be allowed undoubted evidence ought to be adduced that the accused was of diseased mind, and that at the time he committed the act he was not conscious of right or wrong. * * * If that be not satisfactorily proved, he is liable to punishment."

Similarly, in the present case, Hotema may have been a man of weak mind, and may have cherished an honest delusion that witches did exist, and that his tribe would be better off if they were killed, and that it was his moral duty under the teachings of the Bible to kill the witches, but if he had sufficient mental capacity to know that it was a violation of law to kill the alleged witches, and if he had sufficient self-control to refrain from the commission of criminal acts, it is

questionable whether even an insane delusion as to the existence of these witches can excuse him from the penalty of his crime.

The judge's charge, as a whole, was more moderate and was at all times predicated upon the existence of insanity, leaving the erroneous belief to be considered with all other testimony in the case in determining the fact of this insanity. This is clearly shown by the portion of the charge referred to in the twelfth assignment of error, which, in effect, said that if Hotema was laboring "under an insane delusion" and not under an erroneous belief, he should be acquitted.

(13) The thirteenth assignment of error requires no attention; and as to the fourteenth assignment of error, it is enough to say that the instructions requested were already sufficiently covered by the general charge.

Under all the circumstances this verdict should be sustained. It may be a proper question hereafter for the pardoning power whether under all the evidence in the case there is such reasonable doubt of the defendant's sanity as to justify some form of Executive clemency, but as the testimony in the case is not before the court, and as such a question would not be reviewable in this tribunal, I submit that no other course is open on this record except to affirm the judgment of the court below.

Respectfully,

JAMES M. BECK,
Assistant Attorney-General.

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40817

Supreme Court of the United States.

No. 572.—October Term, 1901.

Solomon Hotema, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the Eastern District of Texas.

[June 2, 1902.]

Mr. Justice Peckham delivered the opinion of the Court.

The plaintiff in error was indicted for the murder of Vina Coleman on April 14, 1899, in the Indian Territory. He is an Indian of the Choctaw tribe of Indians, and after having pleaded not guilty to the indictment the venue was changed upon motion, and the cause was sent for trial to the United States District Court holden at Paris in the Eastern District of Texas. Upon the trial before that court the defendant set up the defense of insanity, the jury found him guilty of murder as charged in the indictment, and he was sentenced to suffer the penalty of death. The defendant in the indictment has brought the case here to review that judgment. There is no part of the evidence contained in the bill of exceptions.

The errors which are assigned in this case relate to those contained in the charge of the court to the jury. The first one we notice is an exception to a statement contained in the charge of the court that: "In this case it is not material, so far as the question of the guilt or innocence is concerned, that the evidence fails to show any motive for the killing." The defendant claims that this is error, because the want of motive is material, and the jury should consider that fact in determining the issue as to defendant's sanity at the time of the homicide. The exception to this single remark of the court fails to give the proper view of the charge, and gives a false impression as to the meaning of the court therein. The attention of the court was directed to the subject of proving motive upon the trial of a person charged with murder, and he charged that it was unnecessary to show a motive for the commission of the crime so long as the evidence satisfied the jury that the person charged was in fact guilty of the act; that it was not necessary to prove by any particular expression of the party charged that he had some personal or what may be termed express malice toward the individual who was killed. The court charged as follows upon this subject:

"Murder is where a person of sound memory and discretion unlawfully kills any reasonable creature in being, and in the peace of the United States, with malice aforethought, either express or implied. The term express malice means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly and maliciously executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally of the term 'express malice,' are such as lying in wait for the intended victim, and when he approaches he is slain, or the preparation and administration of poison for the purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution, and therefore is said to be killing upon express malice. These are only illustrations of what is meant by the terms 'express malice,' and any homicide that is shown to have been the result of wilful intent and committed without legal excuse is said to be a killing upon express malice.

"By the term 'implied malice' is meant that in the case charged the evidence shows that the party charged committed the act, and that it was intentional and unlawful, that is, without justifiable excuse, and the evidence fails to reveal the motive why the person committed the act. In that state of case the law attaches or implies malice to the nature of the act done; that is, the taking of human life without justifiable excuse. Where the evidence fails to show that it was done upon express malice, yet it shows that the party charged intentionally did the act without lawful excuse, malice is inferred, although the evidence may not disclose any motive whatever, and therefore if the killing was intentional and without justifiable excuse, although no motive is shown for it, the party would be guilty of murder and should be convicted therefor, unless excused upon the ground of insanity or the want of mental capacity to form a criminal intent. Therefore in this case it is not material, so far as the question of guilt or innocence is concerned, that the evidence fails to show any motive for the killing, because if the killing was intentional and was not justifiable, the law implies the criminal intent, and, unless rebutted by testimony, would justify a conviction, provided the evidence shows that the party charged had sufficient mental ability to be held responsible for his acts."

The expression in the charge which plaintiff excepted to, when read in connection with all that the court said upon the question, is undoubtedly correct.

Prior to giving specific instructions in regard to the legal meaning of the word "insanity," and as to its sufficiency as a defense to the party accused of crime, the court made some general statements upon that subject, as follows:

"Every person, charged with crime, is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof. No act done in a state of insanity can be punished as an offense. The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by

40818

law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, and this conclusion is proven to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proven to be diseased, the person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists."

The court also charged:

"That the burden is upon the government throughout the entire case to prove every essential element of the case charged, and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant Hotema was sane at the time of the commission of the act charged, you will acquit him. . . . The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Hotema had a diseased brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he cannot be punished by law. But if his brain was not in this condition, he can be punished by law, remembering that the burden is upon the government to establish that he was of sound mind, and by that term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act he was committing at the time he was performing it was a wrongful act in violation of human law, and he could be punished therefor, and that he did not perform the act because he was controlled by irresistible and uncontrollable impulse. In that state of case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him. But if you find from the evidence or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was the product of such disease, and that he was incapable of forming a criminal intent, and that he had no control of his mental faculties and the will power to control his actions, but simply slew Vina Coleman because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal."

In relation to the latter part of this charge, in which the court speaks of an irresistible impulse to commit the murder, counsel for the defendant says that he made no claim that the defendant was actuated by an irresistible impulse, and that there is nothing in the evidence to show that he was; that what he did claim was that the defendant was laboring under

an insane delusion, and that this charge did not bring that subject before the jury. As there is no portion of the evidence returned in the bill of exceptions, we are unable to judge whether there was any which would justify, or which did justify the court in submitting the question of irresistible impulse to the jury. If there had been evidence on that subject, the submission of the question was certainly as fair to the defendant as he could ask. We decide nothing further than that.

Upon the other portion of the charge, as to the general liability of the defendant to the criminal law and to the obligation of the government to prove him guilty beyond a reasonable doubt upon taking into consideration all the evidence, and in regard to every essential element of the crime, the charge of the court was undoubtedly correct. (*Davis* v. *United States*, 160 U. S. 469.)

Some evidence was given, as is stated by the court in its charge, in regard to the defendant's drinking whiskey about the time the homicide is said to have been committed. As to his alleged irresponsibility, the court charged:

"Upon this matter you are instructed that the recent use of whiskey would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not Hotema was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the liquor he had drunk, if any. What I intend for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that Hotema was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of whiskey he had drunk; but, in arriving at that conclusion, the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew Vina Coleman by reason of the whiskey he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him."

We can see no cause for fault finding with that portion of the charge on the part of the defendant. The court had already charged there must be a wilful and intentional killing in order to warrant a conviction of murder. If that were present, we have no doubt the fact that defendant had drank some whiskey before the killing was unimportant.

Then in regard to the subject of delusion the court charged:

"There is evidence in this case tending to show that Hotema believed in witches, and that that was taught by the Bible, and had the belief that his people and tribe were being affected by witches, and that the deaths that were occurring in the neighborhood were due to the evil influence of

40819

witches, and that the party he slew was a witch. Upon this phase of the case you are instructed that if the evidence shows that the defendant Hotema believed in witches, and that it was the result of his investigation and belief as to what the Scriptures taught, and that he acted upon that belief, thinking he had the right to kill the party he is charged with killing, because he thought she was a witch, but at the time he knew it was a violation of human law and he would be punished therefor, in that event it would not be an insane delusion upon the part of Hotema, but would be an erroneous conclusion, and, being so, would not excuse him from the consequences of his act. And, also, if you further believe that he came to the conclusion from his investigation and understanding of the Scriptures that this party was a witch, and that the defendant also used spirituous liquors, and these two combined were the cause or causes that led him to the commission of the act, and that either or both of these were the sole inducement that caused him to do the act, he would not be guiltless and would be responsible therefor. Upon the other hand, I charge you that if you should find from the evidence in this case that Solomon Hotema, the defendant, believed that there were witches, and that he had a right to kill them, and if you further find that such belief was the product of a diseased brain, or if you have a reasonable doubt that such condition of brain existed at the time of the homicide, and that his act was the result of such diseased brain, you will acquit him.

"In this case you are to determine the following questions:

"1st. Was the defendant Hotema at the time he committed the homicide charged laboring under an insane delusion produced by an impaired brain, and did it go to the extent for the time being of controlling his will power, reflection, reason and judgment, and was the homicide committed by reason of such insane delusion? If the proof has shown beyond a reasonable doubt that such was not the case, you will convict the defendant, but if there is a reasonable doubt as to such mental condition, you will resolve such doubt in favor of the defendant and acquit him.

"2d. Did Hotema commit the homicide, not laboring under an insane delusion, but believing that by teachings of the Bible he had right to kill the party he did kill because he thought she was a witch, and at the time of such killing he performed the same solely upon such belief, and was not laboring under an insane delusion? If you believe this state of case existed, and so believe it beyond a reasonable doubt, you will find the defendant guilty as charged in this indictment, but if you have a reasonable doubt in regard thereto, you will acquit the defendant."

The court had already properly instructed the jury as to the test to be applied to the general defense of insanity. In substance it had charged the jury that if defendant knew the nature and quality of his act when he committed it, and that it was wrong and a violation of the law of the land, for which he would be punished, that he was responsible for the act he committed. And upon the matter of irresistible impulse, the charge was, as we have said, at least as favorable to the defendant as he had any right to ask.

We think, taking the whole charge together, that the judge properly laid down the law in regard to the responsibility of the defendant on ac-

count of his alleged mental condition. It placed the burden on the government (following *Davis* v. *United States, supra*), of proving beyond a reasonable doubt that the defendant was sane at the time of the commission of the act, as one of the essential features of the crime. It also held that within the legal definition of insanity the defendant was responsible for his acts if at the time of their commission he was of sufficient mental capacity to understand their nature and quality, and that the particular act in question was wrong and a violation of the law of the land for which he would be amenable to punishment under that law.

Upon the condition of mind of defendant regarding witches, the court held that if his belief in witches and his right to kill them were the product of a diseased brain, he was irresponsible, and if the jury had a reasonable doubt on that question, it should acquit. If his belief were not the product of an insane delusion but simply an erroneous conclusion of a sane mind, he was, as the court charged, responsible.

The court, by the portions of the charge above adverted to, directed the attention of the jury to the distinction between a mere erroneous opinion and an insane delusion, the product of a diseased mind or brain. The subject is somewhat difficult and the line of distinction not always easily drawn, but it exists, and we think that in this case the condition of mind which would render the defendant irresponsible was sufficiently and properly indicated by the court in its charge. It assumed that defendant might have formed an erroneous opinion regarding witches and witchcraft, and yet might not have been insane within the legal definition, and therefore, although possessing such erroneous ideas and acting on them, he might still be responsible criminally for his actions. And on the other hand, if his opinion on the subject were the result of insane delusions, and he acted on them, he was irresponsible, and responsibility must be proved beyond a reasonable doubt. We think this was all the defendant could require.

A special plea to the indictment in this case was filed by the defendant, setting up the fact that he had been once placed in jeopardy, and it appeared in the plea that the defendant on the same day on which he killed Vina Coleman also killed two other persons, and two indictments were found charging defendant with the murder of each of such persons, the indictments were thereupon consolidated and upon his trial on the consolidated indictments the defense set up was insanity, the same ground as set up in this case, and it was alleged that the only issue made in the case was whether the defendant was sane or insane at the time that he killed the two persons. The jury upon the trial of defendant on the consolidated indictments for the murder of the two found him not guilty, on the issue of insanity. The indictment in this case was for the killing by the defendant of the third of the three persons, and it is upon these facts that he sets up the plea of once in jeopardy.

While the plea, on such facts, is wholly without merit, and need not be further noticed, it is only adverted to for the purpose of recognizing the fact that the defendant has been charged with the murder of three different persons on the same day, and that seemingly there was no motive shown for the killing of any of them, or, at any rate, there was none shown for the killing of the person described in the indictment in this case, as the charge of the court in substance concedes. It also appears in this record that the first jury impanelled in this case was unable to agree upon a verdict. We are thus made acquainted, from the record, with the fact that one jury, upon the question of the insanity of the defendant, has upon the trial of the consolidated indictments charging him with two distinct and separate murders, acquitted him of the alleged crimes on that ground; another jury has been unable in this case to agree upon the question; a third one has, in the case now before us, convicted him. Being unable to see any legal error committed by the trial court we are bound to affirm the judgment. The question whether, upon a consideration of the facts, the extreme penalty of the law should be carried out upon this defendant, is one which must be addressed to the consideration of the executive, as it is not one over which this court has jurisdiction. The judgment must be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.